

## TABLE OF CONTENTS

	Page
Relevant docket entries . . . . .	1
Amended complaint . . . . .	4
Answer of defendant Wheaton-Haven Recreation Association, Inc. to amended complaint . . . . .	21
Motion of defendants, except Wheaton-Haven and McIntyre, to dismiss amended complaint . . . . .	26
Motion of defendant Wheaton-Haven Recreation Association, Inc. for judgment on the pleadings . . . . .	29
Motion of defendant E. Richard McIntyre to dismiss amended complaint, etc . . . . .	34
Plaintiffs' motion to strike the answer of defendant Wheaton-Haven Recreation Association, Inc. and to renew their motion for summary judgment or, in the alternative, for preliminary injunction . . . . .	36
Opinion of Court of Appeals (Pet. App. B1-B31) . . . . .	39
Opinion of District Court (Pet. App. C1-C13) . . . . .	39
Order of Court of Appeals denying petition for rehearing and suggestion for rehearing <i>en banc</i> . . . . .	40
Affidavit of Samuel A. Chaitovitz . . . . .	41
By-laws of Wheaton-Haven Recreation Association, Inc. . . . .	42
Montgomery County, Maryland, zoning ordinance . . . . .	62

Excerpts from appendix in Supreme Court of the United States in <i>Sullivan v. Little Hunting Park, Inc.</i> , No. 33, October Term, 1969 . . . . .	64
By-laws of Little Hunting Park, Inc . . . . .	65
Excerpts from transcript of proceedings . . . . .	76
Plaintiffs' interrogatories . . . . .	84
Defendants' answers to interrogatories . . . . .	92
Plaintiffs' request for admissions . . . . .	95
Defendants' answer to request for admissions . . . . .	98
Deposition of defendant McIntyre . . . . .	100
Motion of defendants to strike . . . . .	130
Opposition of defendants to motion for judgment on the pleadings, summary judgment, and injunction . . . . .	131
Defendants' memorandum in support of motion to dismiss . . . . .	133
Defendants' memorandum in support of motion for summary judgment . . . . .	135
Motion of defendant E. Richard McIntyre for summary judgment . . . . .	137
Memorandum of defendant E. Richard McIntyre in support of motion for summary judgment . . . . .	138
Memorandum of defendant E. Richard McIntyre in opposition to plaintiffs' motion for summary judgment against defendant McIntyre and/or preliminary injunction . . . . .	140
Opinion and Order in <i>Montgomery County, Maryland v. Elliott</i> , No. 36124 Equity, in the Circuit Court for Montgomery County, Maryland . . . . .	143



IN THE  
**Supreme Court of the United States**

---

October Term, 1971  
No. 71-1136

---

MURRAY TILLMAN, *et al.*,  
*Petitioners,*

v.

WHEATON-HAVEN RECREATION  
ASSOCIATION, INC., *et al.*,  
*Respondents.*

---

On Writ of Certiorari to the United States Court of  
Appeals for the Fourth Circuit

---

**APPENDIX**

---

**RELEVANT DOCKET ENTRIES**

- 10.13.69 — Complaint filed in United States District  
Court for the District of Maryland
12. 5.69 — Motion of defendants, except Richard E.  
McIntyre, to strike

12. 5.69 — Motion of defendant Richard E. McIntyre for relief pursuant to Rule 12, F.R.Civ.P.
- 4.28.70 — Motion of plaintiffs for judgment on the pleadings or summary judgment against defendant Association and individual defendants, except defendant McIntyre, and motion for summary judgment against defendant McIntyre, or, in the alternative, motion for preliminary injunction against all defendants
- 4.30.70 — Opposition of defendants, except Richard E. McIntyre, to motion for judgment on the pleadings, summary judgment, and injunction
- 4.30.70 — Motion of defendants, except Richard E. McIntyre, to dismiss
- 5.13.70 — Motion of defendant Richard E. McIntyre for summary judgment
- 5.15.70 — Motion of defendants, except Richard E. McIntyre, for summary judgment
- 5.27.70 — All Law Motions pending as of this date denied by the Court, Northrop, J., with leave to plaintiffs to file amended complaint
6. 1.70 — Amended complaint filed
- 6.10.70 — Answer of defendant Wheaton-Haven Recreation Association, Inc. to amended complaint
- 6.10.70 — Motion of defendants, except Wheaton-Haven Recreation Association, Inc. and Richard E. McIntyre, to dismiss

- 6.10.70 — Motion of defendant Wheaton-Haven Recreation Association, Inc. for judgment on the pleadings
  - 6.10.70 — Motion of defendant Richard E. McIntyre to dismiss
  - 6.23.70 — Plaintiffs' motion to strike answer of defendant Wheaton-Haven Recreation Association, Inc., and to renew their motion for summary judgment or, in the alternative, for preliminary injunction
  - 7. 8.70 — Opinion and order of the District Court granting defendants' motion for summary judgment
  - 7.13.70 — Plaintiffs' notice of appeal filed
  - 7.16.70 — Plaintiffs' motion for expedited hearing or summary reversal, or in the alternative, for injunction pending appeal
  - 10. 6.70 — Oral argument before Court of Appeals for the Fourth Circuit
  - 10.27.71 — Opinion and judgment of the Court of Appeals
  - 12.16.71 — Petition for rehearing and suggestion for rehearing *en banc* denied
-

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

MURRAY TILLMAN AND ROSALIND N. TILLMAN :  
10514 Cascade Place :  
Silver Spring, Maryland :

HARRY C. PRESS AND FRANCELLE PRESS :  
2016 Cascade Road :  
Silver Spring, Maryland :

GRACE ROSNER :  
9011 Lindale Road :  
Bethesda, Maryland, :

Plaintiffs :

v. :

Civil Action

No. 21294

WHEATON-HAVEN RECREATION :  
ASSOCIATION, INC. :  
10910 Horde Street :  
Silver Spring, Maryland 20902 :

Serve:

Mr. Philip S. Trusso :  
Resident Agent :  
11022 Burnley Terrace :  
Silver Spring, Maryland :

BERNARD KATZ :  
11013 Bucknell Drive :  
Silver Spring, Maryland :

PHILIP S. TRUSSO :  
11022 Burnley Terrace :  
Silver Spring, Maryland :

SIDNEY M. PLITMAN :  
10511 Cascade Place :  
Silver Spring, Maryland :

ANOTHONY J. DeSIMONE

1806 Glenpark Drive  
Silver Spring, Maryland

BRIAN CARROLL

11106 Dodson Lane  
Silver Spring, Maryland

ALBERT FRIEDLAND

11014 Cone Lane  
Silver Spring, Maryland

MRS. ROBERT BENNINGTON

2000 Dayton Street  
Silver Spring, Maryland

MRS. ANTHONY ABATE

2107 Prichard Road  
Silver Spring, Maryland

RICHARD E. McINTYRE

10403 Amherst Avenue  
Silver Spring, Maryland

JAMES V. WELCH

11019 Burnley Terrace  
Silver Spring, Maryland

MRS. ELLEN FENSTERMAKER

1715 Republic Road  
Silver Spring, Maryland

WALTER F. SMITH, JR.

11104 Dodson Lane  
Silver Spring, Maryland

JAMES M. WHITTLES

11107 Bucknell Drive  
Silver Spring, Maryland

Defendants



**AMENDED COMPLAINT FOR PRE-  
LIMINARY AND PERMANENT INJUNCTION,  
SPECIFIC PERFORMANCE, AND DAMAGES**

**I.**

Jurisdiction of the court is invoked pursuant to 28 U.S.C. Sections 1331, 1337, 1343; 2201 and 2202; 42 U.S.C. Sections 1981, 1982, 1983, 1988, and 2000 and the 13th and 14th Amendments to the Constitution of the United States.

**II.**

A. Plaintiffs Murray Tillman and Rosalind N. Tillman, are husband and wife and are hereinafter called Plaintiffs Mr. and Mrs. Murray Tillman. They are citizens of the United States of America and are citizens and residents of the State of Maryland and Montgomery County. Plaintiffs Mr. and Mrs. Murray Tillman reside at 10514 Cascade Place, Silver Spring, Montgomery County, Maryland.

B. Plaintiffs Harry C. Press and Francella Press, are husband and wife and are hereinafter called Plaintiffs Dr. and Mrs. Harry C. Press. They are citizens of the United States of America and are citizens and residents of the State of Maryland and Montgomery County. Dr. and Mrs. Harry C. Press reside at 2016 Cascade Road, Silver Spring, Montgomery County, Maryland.

C. Plaintiff Grace Rosner is a citizen of the United States of America and is a citizen and resident of the State of Maryland and Montgomery County. She resides at 9011 Lindale Road, Bethesda, Montgomery County, Maryland.

**III.**

A. Plaintiffs Dr. and Mrs. Harry C. Press bring this action on their own behalf and pursuant to Rule 23(b)(2) of

the Federal Rules of Civil Procedure, on behalf of all similarly situated Negro citizens living within a 3/4 mile radius of the office and swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc. Such Negro citizens are barred by Defendant Wheaton-Haven Recreation Association, Inc. from applying for and acquiring membership and a certificate of membership in Defendant Wheaton-Haven Recreation Association, Inc.

B. Plaintiffs Mr. and Mrs. Murray Tillman bring this action on their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all similarly situated citizens who are members of and own a certificate of membership in Defendant Wheaton-Haven Recreation Association, Inc. Said members are barred by Defendant Wheaton-Haven Recreation Association, Inc. from bringing Negro guests to the swimming pool operated by Defendant Wheaton-Haven Recreation Association, Inc.

C. Plaintiff Mrs. Grace Rosner brings this action on her own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all similarly situated Negro citizens who are barred by Defendant Wheaton-Haven Recreation Association, Inc., from being brought, as guests to swim at the swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc.

#### IV.

A. Defendant Wheaton-Haven Recreation Association, Inc. is a non-profit Maryland Corporation organized on May 23, 1958, for the purpose of operating a swimming pool for the recreation of the community described in its By-Laws. The Defendant Wheaton-Haven Recreation

Association, Inc. maintains its offices and swimming pool facility at 10910 Horde Street, Silver Spring, Maryland 20902.

B. Defendants Bernard Katz, residing at 11013 Bucknell Drive, Silver Spring, Maryland; Philip S. Trusso, residing at 11022 Burnley Terrace, Silver Spring, Maryland; Sidney M. Plitman, residing at 10511 Cascade Place, Silver Spring, Maryland; Anthony J. DeSimone, residing at 1806 Glenpark Drive, Silver Spring, Maryland; Brian Carroll, residing at 11106 Dodson Lane, Silver Spring, Maryland; Albert Friedland, residing at 11014 Cone Lane, Silver Spring, Maryland; Mrs. Robert Bennington, residing at 2000 Dayton Street, Silver Spring, Maryland; Mrs. Anthony Abate, residing at 2107 Prichard Road, Silver Spring, Maryland; Richard E. McIntyre, residing at 10403 Amherst Avenue, Silver Spring, Maryland; James V. Welch, residing at 11019 Burnley Terrace, Silver Spring, Maryland; Mrs. Ellen Fenstermaker, residing at 1715 Republic Road, Silver Spring, Maryland; Walter F. Smith, Jr., residing at 11104 Dodson Lane, Silver Spring, Maryland and James M. Whittles, residing at 11107 Bucknell Drive, Silver Spring, Maryland, were, at times material herein, officers and/or members of the Board of Directors of Defendant Wheaton-Haven Recreation Association, Inc., and are hereinafter called Defendant Officers and Directors.

## V.

A. Membership in Defendant Wheaton-Haven Recreation Association, Inc. is not personal to the individual but runs to family units and the certificates of membership are so issued. Defendant Wheaton-Haven Recreation Association, Inc.'s By-Laws, adopted July 31, 1958, contain no racial covenants or restrictions on membership, which is limited

only to a prescribed geographic area (3/4 mile radius from the pool) and thirty (30) percent of the total membership may be excluded from that limitations.

B. By 1967 the neighborhood within the prescribed geographic area was a racially integrated community.

## VI.

A. Defendant Wheaton-Haven Recreation Association, Inc.'s pool facility was constructed during 1958 and 1959 pursuant to a special exception granted September 20, 1958 by the Montgomery County Board of Appeals, pursuant to Zoning Ordinance as recited in Sec. 107-28(2-4) Montgomery County Code (1955).

B. The foregoing zoning provision was enacted by the Montgomery County Council by Ordinance No. 3-28 dated May 24, 1955. The Council stated therein that "... the action sets up the community swimming pools as a special exception ... The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

C. On August 13 and August 23, 1958, the Montgomery County Board of Appeals conducted public hearings on Case No. 656, Defendant Wheaton-Haven Recreation Association, Inc.'s application for the special exception. The record of said proceedings indicates that Defendant Wheaton-Haven Recreation Association, Inc.'s witnesses testified that the County was unsuccessfully approached to construct a pool; they further testified that in lieu of County action Defendant Wheaton-Haven Recreation Association, Inc. initiated efforts to serve the imperative recreational

needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

## VII.

A. During hearings before the U. S. Senate Finance Committee regarding H. R. 7125 (later to become P. L. 85.859-Excise Tax Exemption) conducted on July 15, 16, and 17, 1958, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified on behalf of the Montgomery County Community Pools Association, that the community pool was an instrument utilized to serve an imperative recreational need in Montgomery County owing to the failure of government to construct public pools due to lack of adequate resources. It was further asserted that pools provide a healthy and constructive outlet for youth and general benefit to the public at large, and that they provide recreation to lower middle income groups that would otherwise be unavailable. Mr. Rotkin further stated that the community pool was distinguished from private country clubs.

B. Defendant Wheaton-Haven Recreation Association, Inc. is exempt from and does not pay Federal or State income taxes under the provision of the U. S. Internal Revenue Code, Section 501(c)(7) and the Maryland Code, Art. 81, Sec. 88(g)(8). Defendant Wheaton-Haven Recreation Association, Inc. also obtained an exemption from U. S. Excise Taxes during the years 1958 through 1964. All this tax relief was granted Defendant Wheaton-Haven Recreation Association, Inc. because of its function as a community swimming facility.



C. Defendant Wheaton-Haven Recreation Association, Inc., until May, 1968, posted the telephone number of the membership chairman on a large sign located in a conspicuous position at the pool, thus serving as an open invitation for membership. It was common knowledge in the community that Defendant Wheaton-Haven Recreation Association, Inc.'s membership was open.

### VIII.

Defendant Wheaton-Haven Recreation Association, Inc. is a public accomodation as described and defined in the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000).

### IX.

A. Since on or about April and May 1968, and continuing to date, Defendant Wheaton-Haven Recreation Association, Inc. and its Defendant Officers and Directors have refused and continue to refuse to make available an application for membership to Plaintiffs Dr. and Mrs. Harry C. Press and refused, and continue to refuse, to accept them into membership and to allow them to acquire a certificate of membership solely because Plaintiffs Dr. and Mrs. Harry C. Press are Negroes and this was done intentionally pursuant to Defendants' practices and policies of discriminating against Plaintiffs Dr. and Mrs. Harry C. Press and the class they represent because of their race and color.

B. Plaintiffs Dr. and Mrs. Harry C. Press live within the 3/4 mile radius prescribed for membership eligibility in Defendant Wheaton-Haven Recreation Association, Inc.'s By-Laws, meet all qualifications for membership and have desired and presently desire to join Defendant Wheaton-Haven Recreation Association, Inc., and obtain a certificate

of membership, and are able to assume the financial responsibilities of membership.

#### X.

A. Since on or about July 24, 1968, and continuing to date, Defendant Wheaton-Haven Recreation Association, Inc. and Defendant Officers and Directors have refused to permit Plaintiffs Mr. and Mrs. Murray Tillman to bring Plaintiff, Mrs. Grace Rosner, a Negro, as a guest into the pool facility solely because Mrs. Grace Rosner is a Negro. This was done intentionally pursuant to Defendants' practice of discriminating against Plaintiff Mrs. Grace Rosner and the class she represents on account of their race and color.

B. Since on or about July 20, 1968, and continuing to date, a rule was promulgated by Defendant Wheaton-Haven Recreation Association, Inc. and Defendant Officers and Directors, that limited guests to relatives of members of Defendant. This was done intentionally pursuant to Defendant's practice of discriminating against Plaintiff Mrs. Grace Rosner and the class she represents on account of their race and color.

C. At all times material Plaintiffs Mr. and Mrs. Murray Tillman tendered and were willing and able to pay the appropriate guest fees.

#### COUNT I.

A. Plaintiffs Dr. and Mrs. Harry C. Press repeat and re-allege as part of this cause of action each and all of the allegations of fact contained in sections I - IX inclusive of this complaint, with like effect as if herein fully repeated, and, in addition, aver that the policy of Defendants of excluding Negroes from membership:

1. Constitutes a badge or token of slavery and an imposition of second-class citizenship in violation of the thirteenth Amendment of the Constitution of the United States;

2. Because of the extensive and substantial State and County participation in the origin, development and existence of Wheaton-Haven Recreation Association, Inc., renders the State of Maryland and Montgomery County co-partners in Defendant's racially discriminatory conduct, making such conduct a violation of the fourteenth Amendment of the Constitution of the United States;

3. Interferes with Plaintiffs Dr. and Mrs. Harry C. Press' rights to purchase and own real or personal property, and to make and enforce contracts, because of their race and color in violation of the Civil Rights Acts of 1866 and 1870 (42 U.S.C. Secs. 1982, 1981).

4. Deprives Plaintiffs Dr. and Mrs. Harry C. Press of rights, privileges and immunities guaranteed by the Constitution and Laws of the United States because of their race and color in violation of the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983).

5. Interferes with Plaintiffs Dr. and Mrs. Harry C. Press' right to use and enjoy facilities of public accommodation because of their race or color in violation of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000).

B. As a direct and proximate result of the wrongful acts of Defendants alleged herein, Plaintiffs Dr. and Mrs. Harry C. Press have suffered actual damages and will continue to suffer damages from humiliation and embarrassment caused by the refusal of Defendant Officers and Directors and Defendant Wheaton-Haven Recreation

Association, Inc. to admit them to membership because of their race and the deprivation by Defendants of Plaintiffs Dr. and Mrs. Harry C. Press' constitutional and statutory rights as herein before described. Because of Defendant Wheaton-Haven Recreation Association, Inc.'s and Defendant Officers and Directors' willful, intentional and malicious refusal to permit Plaintiffs, or the class they represent, to become members of the Defendant Wheaton-Haven Recreation Association, Inc. because of their race or color, Plaintiffs claim actual and punitive or exemplary damages in the amount of \$10,000.00.

## COUNT II.

A. Plaintiff Mrs. Grace Rosner repeats and realleges, as part of this cause of action, each and all of the allegations of fact contained in sections I - VIII, inclusive, and section X of this complaint, with like effect as if herein fully repeated, and, in addition, aver that the policy of Defendants of refusing to permit Negro guests:

1. Constitutes a badge or token of slavery and an imposition of second-class citizenship in violation of the thirteenth Amendment of the Constitution of the United States;
2. Because of the extensive and substantial State and County participation in the origin, development and existence of Wheaton-Haven Recreation Association, Inc., renders the State of Maryland and Montgomery County co-partners in Defendants' racially discriminatory conduct, making such conduct a violation of the fourteenth Amendment of the Constitution of the United States;
3. Interferes with Plaintiff Mrs. Grace Rosner's rights to make and enforce contracts because of her race or color

in violation of the Civil Rights Act of 1870 (42 U.S.C. Sec. 1981).

4. Deprives Plaintiff Mrs. Grace Rosner of rights to purchase, lease and hold real and personal property and to make and enforce contracts, because of her race or color, in violation of the Civil Rights Acts of 1866 and 1870 (42 U.S.C. Secs. 1981, 1982).

5. Interferes with Plaintiff Mrs. Grace Rosner's right to use and enjoy facilities of public accommodation because of her race or color in violation of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000).

B. As a direct and proximate result of the wrongful acts of Defendants alleged herein, Plaintiff Mrs. Grace Rosner has suffered actual damages and will continue to suffer damages from humiliation and embarrassment caused by Defendants' refusal to admit Negro guests and the deprivation by Defendants of Plaintiff Mrs. Grace Rosner's constitutional and statutory rights as herein before described. Because of Defendant Officers' and Directors' and Defendant Wheaton-Haven Recreation Association, Inc. willful, intentional and malicious refusal to permit Plaintiff Mrs. Grace Rosner, or the class she represents, to be admitted as guests to the swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc., because of their race or color, Plaintiff Mrs. Grace Rosner claims actual and punitive or exemplary damages in the amount of \$10,000.00.

### COUNT III.

A. Plaintiffs Mr. and Mrs. Murray Tillman repeat and reallege, as part of this cause of action, each and all of the allegations of fact contained in sections I - X, inclusive of this complaint, with like effect as if herein fully



repeated, and, in addition, aver that the policy of Defendants of excluding Negroes from membership and refusing to permit Negro guests:

1. Constitutes a badge or token of slavery and an imposition of second-class citizenship in violation of the thirteenth Amendment of the Constitution of the United States;

2. Because of the extensive and substantial State and County participation in the origin, development and existence of Wheaton-Haven Recreation Association, Inc., renders the State of Maryland and Montgomery County co-partners in Defendants' racially discriminatory conduct, making such conduct a violation of the fourteenth Amendment of the Constitution of the United States;

3. Deprives Plaintiffs Mr. and Mrs. Murray Tillman of rights to purchase, lease, sell, hold and convey real and personal property, and to make and enforce contracts without interference or restriction from any source on the basis of race or color, in violation of the Civil Rights Acts of 1866 and 1870 (42 U.S.C. Secs. 1981 and 1982).

4. Deprives Plaintiffs Mr. and Mrs. Murray Tillman of rights and privileges and immunities guaranteed by the Constitution and Laws of the United States because of their desire to associate with members of both the Negro and Caucasian races, in violation of the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983).

5. Interferes with Plaintiff Mr. and Mrs. Murray Tillman's right to use and enjoy facilities of public accommodation because of their desire to associate with members of both the Negro and Caucasian races in violation of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000).

B. The relationship of Plaintiffs Mr. and Mrs. Murray Tillman to Defendant Wheaton-Haven Recreation Association, Inc. is founded upon contracts which contain no mention of Defendants' discriminatory policies. Defendant Wheaton-Haven Recreation Association, Inc.'s By-Laws do not place any restriction on guest privileges and do not maintain any racially discriminatory policy.

C. The rule adopted by Defendant Officers and Directors which limited guests to relatives of members was promulgated and enforced only for the purpose of excluding Negro guests and is therefore void as against public policy, as herein before described.

D. In preventing Plaintiffs Mr. and Mrs. Murray Tillman from bringing Negro guests to the swimming pool facility, Defendants are acting in violation of Plaintiffs Mr. and Mrs. Murray Tillman's contract rights.

E. As a direct and proximate result of the wrongful acts of Defendant Wheaton-Haven Recreation Association, Inc. and Defendant Officers and Directors alleged herein, Plaintiffs Mr. and Mrs. Murray Tillman suffered actual damages, and will continue to suffer damages, a) caused by breach of the contract by the Defendants as described herein; b) from humiliation and embarrassment caused by Defendants' refusal to allow members to bring Negro guests; and c) from the deprivation by Defendants' of Plaintiffs Mr. and Mrs. Murray Tillman's constitutional and statutory rights as herein before described. Because of Defendant Officers' and Directors' and Defendant Wheaton-Haven Recreation Association, Inc.'s willful and malicious refusal to permit Plaintiffs Mr. and Mrs. Murray Tillman, or the class they represent, to bring Negro guests to the swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc., Plaintiffs Mr. and Mrs. Murray

Tillman claim actual and punitive or exemplary damages in the amount of \$10,000.00.

**DAMAGE IS CONTINUING  
AND IRREPARABLE**

Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a permanent injunction and a decree of specific performance is their only means of securing adequate relief. Plaintiffs and the classes they represent are now suffering, and will continue to suffer, irreparable injury from Defendants' acts and policy or practice of racial discrimination unless relief is provided by this Court.

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment for Plaintiffs as follows:

1. Granting Plaintiffs and the classes they represent a preliminary and permanent injunction enjoining Defendant Officers and Directors and Defendant Wheaton-Haven Recreation Association, Inc., its agents, employees and those acting in concert with it from maintaining a policy of discrimination against Negroes seeking to become members of Defendant Wheaton-Haven Recreation Association, Inc., or to enter and use the swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc. as guests, and from maintaining or continuing a custom, policy or practice of discriminating against Plaintiffs and the classes they represent on the grounds of race or color or because they wish to associate with both members of the Negro and Caucasian races.
2. Ordering Defendant Wheaton-Haven Recreation Association, Inc. be ordered to perform its contract with Plaintiffs Mr. and Mrs. Murray Tillman, who are members of Defendant Wheaton-Haven Recreation Association, Inc. and that

Defendant Officers and Directors and Defendant Wheaton-Haven Recreation Association, Inc. specifically be ordered to permit Plaintiffs Mr. and Mrs. Murray Tillman to bring to Defendant Wheaton-Haven Recreation Association, Inc. guests of any race, color, religion or national origin.

3. Declaring the policy of Defendant Officers and Directors and Defendant Wheaton-Haven Recreation Association, Inc., its agents, servants, and employees, in excluding members of the Negro race from membership, ownership of certificate of membership, or guest privileges, to be in violation of the laws and the Constitution of the United States.

4. Granting Plaintiffs Dr. and Mrs. Harry C. Press judgment against all Defendants, jointly and severally, for actual and punitive or exemplary damages in the amount of \$10,000.00.

5. Granting Plaintiff Mrs. Grace Rosner judgment against all Defendants, jointly and severally, for actual and punitive or exemplary damages in the amount of \$10,000.00.

6. Granting Plaintiffs Mr. and Mrs. Murray Tillman judgment against all Defendants, jointly and severally, for actual and punitive or exemplary damages in the amount of \$10,000.00.

7. Awarding Plaintiffs their costs herein.

8. Awarding Plaintiffs reasonable attorney's fees.

9. Granting Plaintiffs and the class they represent such further and additional relief as the Court may deem just and proper.

---

Raymond W. Russell  
22 West Jefferson Street  
Rockville, Md. 20850

---

M. Michael Cramer  
358 Hungerford Drive  
Rockville, Maryland

---

Allison W. Brown, Jr.  
Suite 501, 1424 - 16th Street, N.W.  
Washington, D.C. 20036

---

Samuel A. Chaltovitz  
11509 Rokeby Avenue  
Kensington, Maryland

State of Maryland )  
County of Montgomery ) ss.:

The undersigned, being duly sworn, deposes and says that he is a plaintiff in the above action; that he has read the foregoing complaint and states that it is true to the best of his knowledge, belief or information.

/s/ Harry C. Press  
Plaintiff Dr. Harry C. Press

Sworn to before me this 18th  
day of September, 1969

/s/ Lila Kanstoroom  
Notary Public

State of Maryland )  
County of Montgomery ) ss.:

The undersigned, being duly sworn, deposes and says that she is a plaintiff in the above action; that she has read the foregoing complaint and states that it is true to the best of her knowledge, belief or information.

/s/ Francella Press  
Plaintiff Mrs. Francella Press

Sworn to before me this 18th  
day of September, 1969

/s/ Lila Kanstoroom  
Notary Public

State of Maryland )  
County of Montgomery ) ss.:

The undersigned, being duly sworn, deposes and says that he is a plaintiff in the above action; that he has read the foregoing complaint and states that it is true to the best of his knowledge, belief or information.

/s/ Murray Tillman  
Plaintiff Mr. Murray Tillman

Sworn to before me this 18th  
day of September, 1969

/s/ Lila Kanstoroom  
Notary Public



State of Maryland            )  
County of Montgomery        ) ss.:

The undersigned, being duly sworn, deposes and says that she is a plaintiff in the above action; that she has read the foregoing complaint and states that it is true to the best of her knowledge, belief or information.

/s/ Rosalind N. Tillman  
Plaintiff Mrs. Rosalind N. Tillman

Sworn to before me this 18th  
day of September, 1969

/s/ Lila Kanstoroom

Notary Public

State of Maryland            )  
County of Montgomery        ) ss.:

The undersigned, being duly sworn, deposes and says that she is a plaintiff in the above action; that she has read the foregoing complaint and states that it is true to the best of her knowledge, belief or information.

/s/ Grace Rosner  
Plaintiff Mrs. Grace Rosner

Sworn to before me this 18th  
day of September, 1969

/s/ Lila Kanstoroom

Notary Public

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

ANSWER

The Defendant, Wheaton-Haven Recreation Association, Inc., by its attorney, Henry J. Noyes, in answer to Amended Complaint, says:

## I

That it denies the jurisdiction of the Court in that none of the sections of the United States Code cited are applicable to the controversy herein, nor do the thirteenth and fourteenth amendments to the Constitution of the United States apply.

## II

- A. That it admits the allegations contained herein.
- B. That it admits the allegations contained herein.
- C. That it admits the allegations contained herein.

## III

A. That it denies that this is a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, in that the Plaintiffs, Press, have no standing to bring such suit, and have failed to set forth with particularity the efforts of the Plaintiffs to secure from the managing directors of the Defendant corporation, or its shareholders the action they desire, and the reasons for their failure to obtain such action, or the reasons for not making such effort.

B. That it denies that this is a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, in that the Plaintiffs, Tillman, have no standing to bring such suit, and have failed to set forth with particularity the efforts of the Plaintiffs to secure from the managing directors of the Defendant corporation, or its shareholders the action they desire, and the reasons for their failure to obtain such action, or the reasons for not making such effort.

C. That it denies that this is a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, in that the Plaintiff, Rosner, has no standing to bring such suit, and has failed to set forth with particularity the efforts of the Plaintiff to secure from the managing directors of the Defendant corporation, or its shareholders the action she desires, and the reasons for her failure to obtain such action, or the reasons for not making such effort.

#### IV

A. That it admits the allegations contained herein.

B. That it admits the allegations contained herein.

#### V

A. That it denies the allegations contained herein.

B. That it denies the allegation contained herein, in that it has no specific information, standards, or guidelines to determine what is a "racially integrated community".

#### VI

A. That it admits the allegations contained herein.

B. That it denies the allegations contained herein, for the reason that it has no specific information as to what the Montgomery County Council stated in May of 1955.

C. That it denies the allegation contained herein for the reason that it has no independent recollection as to what witnesses testified to in 1958.

#### VII

A. That it denies the allegation contained herein for the reason that the alleged statements of Irving J. Rotkin,

whomever he may be, if made at all, were made prior to the construction of the swimming pool owned by the Defendant, were made without any authorization by the Defendant, its agents, servants, and/or employees, and are not binding upon the said Defendant, for whatever relevancy they may have.

B. That it admits the allegation that it is exempt from Federal income taxes pursuant to U. S. Internal Revenue Code, Section 501, (c)(7) which grants such exemption to "clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which enures to the benefit of any private shareholder", denies any exemption under the Annotated Code of Maryland, Article 81, Section 88(g)(8), since the said Statute in no way relates to State income taxes, but rather relates to purchase by County Commissioners of properties offered for non-payment of real estate taxes; that it denies that it obtained an exemption from U. S. Excise taxes as alleged; that it denies that the said tax relief was granted because of its function of a community swimming facility, and affirmatively represents that it pays State and County real estate taxes.

C. That it denies that the telephone number of the membership chairman was posted as an open invitation for membership, and has no information to either admit or deny what was "common knowledge" in the community.

### VIII

That it denies the allegation contained herein and affirmatively represents and avers that the Civil Rights Act of 1964 (42 U.S.C. Section 2000), by its very terms, is inapplicable to the Defendant corporation, or any of its activities.

## IX

- A. That it denies the allegations contained herein.
- B. That it denies the allegations contained herein.

## X.

- A. That it denies the allegations contained herein.
- B. That it denies the allegations contained herein.
- C. That it denies the allegations contained herein.

## COUNT ONE

- A. That it denies the allegations contained herein.
  - 1. That it denies the allegations contained herein.
  - 2. That it denies the allegations contained herein.
  - 3. That it denies the allegations contained herein.
  - 4. That it denies the allegations contained herein.
  - 5. That it denies the allegations contained herein.
- B. That it denies the allegations contained herein.

## COUNT TWO

- A. That it denies the allegations contained herein.
  - 1. That it denies the allegations contained herein.
  - 2. That it denies the allegations contained herein.
  - 3. That it denies the allegations contained herein.
  - 4. That it denies the allegations contained herein.
  - 5. That it denies the allegations contained herein.

B. That it admits the allegations contained herein with the exception of that allegation that states "Defendant Wheaton-Haven Recreation Association, Inc.'s By-laws do not place any restriction on guest privileges," which is specifically denied.

C. That it denies the allegations contained herein.

D. That it denies the allegations contained herein.

E. That it denies the allegations contained herein.

**DAMAGE IS CONTINUING AND IRREPARABLE**

The Defendant denies the allegation contained herein.

WHEREFORE, the Defendant prays:

1. That the Complaint be dismissed with its proper costs.

/s/ Henry J. Noyes

Attorney for Defendant

[Certificate of Service]

---

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

[Caption omitted in printing]

**MOTION TO DISMISS**

The Defendants, Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, by their attorney, Henry J.



Noyes, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure move this Honorable Court to dismiss Amended Complaint filed by the Plaintiffs, and for reasons state:

1. That the said Complaint fails to state a claim upon which relief can be granted against the individual Defendants.

### POINTS AND AUTHORITIES

The Amended Complaint, in paragraph IV B. names the individual Defendants as "officers and/or members of the Board of Directors of Defendant Wheaton-Haven Recreation Association, Inc." Paragraphs IX and X, of the said allegations of fact, state that "its Defendant officers and directors have refused and continue to refuse to make available an application for membership to Plaintiffs Dr. and Mrs. Harry C. Press, and refused, and continue to refuse, to accept them into membership \* \* \* solely because they are Negroes". The remainder of the said Amended Complaint is devoid of any further reference to the individual Defendants. This case therefore falls squarely within the gambit of Fletcher v. Havre De Grace Fireworks Company, Inc., et al., 229 Md. 196, and cases and text cited therein, at Page 200:

"In order to show that the officers and directors of the fireworks company are personally liable for the tort committed by the corporation, or, in other words, state a cause of action against the officer-director defendants that is not demurrable, we think section c requires the plaintiff to clearly state such facts as will charge the individual defendants with having either *specifically directed*, or *actively participated* or

*cooperated in*, a particular act of commission or omission that wrongfully triggered the series of explosions. *Levi v. Schwartz*, 201 Md. 575, 95 A.2d 322 (1953). See also *Lobato v. Pay-Less Drug Stores*, 261 F.2d 406 (C.A. 10 1958), where the Court, citing the *Levi* case, points out (at p. 409) that "(s)pecific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation." To the same effect, see also 3 *Fletcher, Corporations* (Perm. Ed.), Section 1137; 13 *Am. Jur., Corporations*, Section 1087; 6 *M.L.E., Corporations*, Section 232. It is manifest, we think, that the allegation in the trespass q.c.f. count that the officer-director defendants had and exercised "complete direction and control over all phases of the conduct of the business of the defendant company," and the more comprehensive allegation of similar import in the negligence, extra-hazardous and nuisance counts, fall far short of alleging that the individual defendants had personally directed or actively participated or cooperated in the tort committed by the corporation. Cf. *Callahan v. Clemens*, 184 Md. 520, 41 A.2d 473 (1945).

The allegations set forth in the Amended Complaint fall far short of the requirements set forth in *Fletcher, supra*. There is no allegation as to which of the individual Defendants were officers or members of the Board of Directors, or both. There is no indication that their role, if any, was anything more than passive. There is not even an

allegation that anyone *specifically directed*, or *actively participated*, or *cooperated in* any of the allegations mentioned in the said Complaint. The defendants respectfully pray that the amended complaint be dismissed.

/s/ Henry J. Noyes

Attorney for Defendants

[Certificate of Service, dated June 9, 1970]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

**MOTION FOR JUDGMENT ON THE PLEADINGS**

The Defendant, Wheaton-Haven Recreation Association, Inc., by its attorney, Henry J. Noyes, moves for judgment on the pleadings, in its favor, and for reasons states:

1. That none of the Sections of the United States Code, as cited, upon which the Plaintiffs rely, are applicable to the facts as alleged by the said Plaintiffs.

**POINTS AND AUTHORITIES**

Other than the jurisdictional sections of the United States Code, set forth in Title 28, the Plaintiffs rely on five sections of the Code, in Title 42, being Sections 1981, 1982, 1983, 1988, and 2000. An analysis of each of these sections indicates that none applies to the pending controversy, even assuming the truth of all of the allegations set forth in the Amended Complaint.

42 U.S.C. SECTION 1981

**"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."**

This Statute is a lineal descendant of the Fourteenth Amendment to the United States Constitution, being the equal protection of the laws clause. The recent Supreme Court case of *Adickes v. S. H. Kress and Company*, No. 79, October Term, 1969, decided on June 1, 1970, reaffirms the well-established principles that individual invasion of individual rights is not the subject matter of the Fourteenth Amendment. It is a State action of a particular character that is prohibited. A prerequisite to recovery under Section 1981 requires some showing of State involvement, i.e., that the Defendants deprived the Plaintiffs of their constitutional rights under color of a Statute, ordinance, regulation, custom or usage, of a State, under color of law. The Amended Complaint is devoid of any involvement by Montgomery County, Maryland, or the State of Maryland.

42 U.S.C. SECTION 1982

**"All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."**

This Statute is derived from the citizenship clause of the Fourteenth Amendment to the United States Constitution. The Plaintiffs apparently rely on the recent Supreme Court case of *Sullivan v. Little Hunting Park, Inc.*, No. 33, October Term, 1969, decided on December 15, 1969. However, the Plaintiffs, Press, make no allegation, and can make no allegation, that the former owners of their home were members of the pool, and that they were deprived of any right to obtain an assignment of membership, as was the situation in the *Little Hunting Park* case. The Plaintiffs Tillman, make no allegation that they have been denied the right to convey any property, either real or personal, to Press. Press makes no allegation that he has been denied the right to purchase, lease, sell, hold, or convey any real or personal property from Tillman. The Defendants are unable to offer the Court any argument regarding the frivolous claim of the Plaintiff Rosner, under this Statute, since there appears to be no law, State, Federal, statutory, or common, that would support her vague claim. In addition, the state action, or involvement, required by *Adickes v. Kress*, supra, is totally lacking.

#### 42 U.S.C. SECTION 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Statute is also derived from the citizenship clause of the Fourteenth Amendment to the United States Constitution. *Adickes v. Kress*, *supra*, is directly on point, and bars recovery herein, since there is no State involvement.

"Section 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of State compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in *Shelley v. Kraemer*, 334 U.S. 1, 13, Section 1 of that Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

#### 42 U.S.C. SECTION 1988

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."



This is a jurisdictional statute, relating to damages, and, of course, is inapplicable in absence of liability.

#### 42 U.S.C. SECTION 2000(a)

Under *Adickes v. Kress*, *supra*, it should only be necessary to cite Section 2000(a)(d):

"Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance or regulation; or (2) is carried on under color of any custom, or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof."

In addition, the only possible category which would place the Defendant swimming pool, within this statute, would be the classification of said swimming pool as an "other place of exhibition or entertainment" as contemplated by Section 2000(a)(b). Although it is not conceded that the said swimming pool falls into this category, the additional requirement of Section 2000(a)(c) that "it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce" bars recovery under this Section.

#### CONCLUSION

*Adickes v. Kress*, *supra*, has narrowly limited recovery under any of the cited statutes, and has tacitly overruled *Sullivan v. Little Hunting Park, Inc.* The State involvement, required to be shown, is an active role in carrying on segregation under some sort of law, statute, ordinance, regulation, custom, usage, or specific requirement. The

Plaintiffs make no allegation, and indeed cannot do so. Quite to the contrary, the prior pleadings filed by the Plaintiffs indicate that Montgomery County, Maryland, through its Human Relations Commission, has conducted certain proceedings, in an attempt to end alleged segregation at the Defendants' pool, and has, by its County Attorney, instituted injunctive proceedings in the Circuit Court for Montgomery County, Maryland. It is therefore respectfully prayed that judgment on the pleadings be granted in favor of the Defendant, Wheaton-Haven Recreation Association, Inc.

/s/ Henry J. Noyes  
Attorney for Defendants

[Certificate of Service, dated June 9, 1970]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

**MOTION OF E. RICHARD McINTYRE, DEFENDANT,  
TO DISMISS AND FOR OTHER RELIEF  
PURSUANT TO RULE 12, F.R.C.P.**

E. Richard McIntyre, one of the Defendants herein, by John H. Mudd and H. Thomas Howell, his attorneys, moves the Court pursuant to Rules 12 and 56, Federal Rules of Civil Procedure, for an Order as follows:

1. To dismiss the action against the Defendant, E. Richard McIntyre, because the Amended Complaint fails to state a claim against the said Defendant upon which can be

granted; or in the alternative, for a summary judgment for said Defendant on the ground that there is no genuine issue as to any material fact and that the said Defendant is entitled to judgment as a matter of law. In support of said Motion, the Defendant refers the Court to the deposition of the said Defendant on file in these proceedings.

2. To strike from the Amended Complaint paragraph B of Counts I and II and paragraph E of Count III, and paragraphs 4, 5, and 6 of the prayer for relief, wherein Plaintiff claims actual and punitive or exemplary damages on the ground that the Amended Complaint fails to state a claim upon which such relief can be granted against the Defendant, E. Richard McIntyre, or in the alternative, for a partial summary judgment for the said Defendant on the ground that there is no genuine issue as to any material fact and that the said Defendant is entitled to judgment as a matter of law with respect to said alleged claim for damages. In support of said Motion, the Defendant refers the Court to the deposition of the said Defendant on file in said proceedings.

3. To dismiss the action as a class action, or, in the alternative, to require amendment of the Amended Complaint pursuant to Rule 23(d)(4) to eliminate therefrom allegations as to representation of absent persons, on the ground that the Amended Complaint fails to state a claim entitling Plaintiffs to relief in a class action in that the existence of a class is not shown and the members of the class are not so numerous as to make it impracticable to bring them before the Court.

4. To strike from the Amended Complaint pages 16, 17 and 18 thereof on the ground that the purported affidavits were executed eight months prior to the preparation and filing of the Amended Complaint and constitute

improper and ineffective verification of said Amended Complaint.

WHEREFORE, the Defendant, E. Richard McIntyre, demands judgment, dismissing this action with prejudice with costs in favor of the said Defendant.

/s/ John H. Mudd

/s/ H. Thomas Howell

10 Light Street (17th floor)  
Baltimore, Maryland 21202  
LE 9-5040  
Attorneys for Defendant,  
E. Richard McIntyre

[Certificate of Service, dated June 9, 1970]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption Omitted in Printing]

**PLAINTIFFS' MOTION TO STRIKE THE ANSWER  
OF DEFENDANT WHEATON-HAVEN RECREATION  
ASSOCIATION, INC., AND TO RENEW THEIR MO-  
TION FOR SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, FOR PRELIMINARY INJUNCTION**

Plaintiffs move to strike the answer of defendant Wheaton-Haven Recreation Association, Inc., and to renew their motion for summary judgment or, in the alternative, for preliminary injunction. In support of their motion, plaintiffs show the Court as follows:

1. The answer of Wheaton-Haven Recreation Association, Inc. should be stricken, because it contains denials of many facts already admitted on the record by said defendant, and hence it constitutes a frivolous and dilatory pleading, and unnecessarily burdens the Court's processes.
2. Many of the facts now denied by defendant Wheaton-Haven Recreation Association, Inc. have already been established as undisputed on the basis of the original verified complaint, deposition, answers to interrogatories and admissions on file. In addition, said defendant filed a motion for summary judgment in response to the original complaint, alleging that there is "no genuine dispute between the parties as to any material fact." The amended complaint that was thereafter filed by plaintiffs did not change any allegation of fact, and hence the answer now filed by defendant Wheaton-Haven Recreation Association, Inc. is utterly in conflict with its earlier motion for summary judgment.
3. In accordance with the motion of plaintiffs previously filed herein, which plaintiffs now renew, the Court should grant summary judgment against all the defendants, except as to the issues of damages and the liability of individual officers and directors therefor, on the ground that there is no genuine issue as to any other material fact and that plaintiffs are entitled to judgment as a matter of law.
4. In the event the Court is of the view that it may not be able promptly to grant the relief requested in paragraph 3, *supra*, plaintiffs renew their motion for preliminary injunctive relief, as prayed for in the complaint and amended complaint, pending final determination of the issues involved herein. As grounds for the granting of a preliminary injunction, plaintiffs state:

a) This action is brought for the purpose of requiring defendants to cease discriminating against Negroes with respect to membership and guest privileges in a community swimming pool operated by defendants.

b) The racial discrimination practiced by defednants is plainly unlawful under the decisions in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) and *Scott v. Young*, 421 F.2d 143 (C.A. 4, 1970), cert. denied, May 25, 1970, 38 U.S. Law Week 3461.

c) The swimming pool in question is open, and the right to use it is of value to plaintiffs, only during the summer swimming season of approximately May 30, 1970 to September 7, 1970.

d) Unless restrained by this Court, defendants will continue to engage in the conduct referred to.

e) Such conduct by defendants will result in irreparable injury and loss to the plaintiffs.

f) The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendants but will prevent irreparable injury to plaintiffs.

WHEREFORE, plaintiffs pray that the relief requested above be granted.

/s/ Raymond W. Russell  
Raymond W. Russell  
22 West Jefferson Street  
Rockville, Md. 20850  
Allison W. Brown, Jr.  
Suite 501, 1424 16th St., N.W.  
Washington, D.C. 20036  
Attorneys for Plaintiffs

[Certificate of Service, dated June 21, 1970]



**The opinion of the Court of Appeals is contained in the  
Petition for Certiorari (Appendix B, pp. B-1-31)**

\*\*\*\*\*

**The opinion of the District Court is contained in the  
Petition for Certiorari (Appendix C, pp. C-1-13)**

[Filed December 16, 1971]

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

[Caption omitted in printing]

ORDER

Upon consideration of the petition for rehearing and of the suggestion for rehearing en banc, the court having been polled and less than a majority of the panel having voted for a rehearing and less than a majority of the court having voted for a rehearing en banc,

IT IS NOW ORDERED that the petition for rehearing and the suggestion for rehearing en banc be, and they hereby are, denied.

For The Court:

/s/ Clement Haynsworth  
Chief Judge, Fourth Circuit

\*\*\*

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

AFFIDAVIT

City of Washington :  
: ss  
District of Columbia :

Samuel A. Chaitovitz, being duly sworn and of his own personal knowledge, deposes and says: I reside at 11509 Rokeby Ave., Kensington, Maryland. On Thursday evening, June 11, 1970, in the company of Bernard Katz, an officer and director of Wheaton-Haven Recreation Association, Inc., I went to the swimming pool facility operated by the Wheaton-Haven Recreation Association, Inc. While at the swimming pool I inspected the pump room and I observed, therein, various machinery and equipment including: pumps bearing a label indicating that they were manufactured by the Marlow Pumps Division of I.T.T. located in Midland, New Jersey and Longview, Texas; a motor bearing a label indicating that it was manufactured by U.S. Electrical Motors located in Los Angeles, California, and Milford, Conn.; and a chlorine feeder (Chlor-O-Feeder), bearing a label indicating that it was manufactured by Proportioneers, Inc. located in Providence, R. I.

On the same evening of June 11, 1970, in the home of Bernard Katz I inspected certain books containing some of the minutes of the board of directors' meetings of the Wheaton-Haven Recreation Association, Inc. The minutes for the board of directors' meeting of July 20, 1968 indicated that Director E. Richard McIntyre was present at the meeting. The minutes stated that there was discussion

of the guest problem and that Director Katz made a motion, seconded by Mrs. Hook, that guests to the pool be limited to relatives of members of Wheaton-Haven Recreation Association, Inc. The minutes indicate that after discussion, this motion was passed unanimously.

I have read the foregoing and state that it is true and accurate to the best of my knowledge and recollection.

/s/ Samuel A. Chaitovitz  
Samuel A. Chaitovitz

Sworn to before me  
this 22nd day of June, 1970

/s/ Robert B. Green  
Notary Public

My Commission Expires Sept. 30, 1972

---

**WHEATON-HAVEN RECREATION ASSOCIATION, INC.**  
10900 Horde Street, Wheaton, Md.

### **BY-LAWS**

#### **ARTICLE I – Name**

The name of this Association shall be the Wheaton-Haven Recreation Association, Inc.

#### **ARTICLE II – Purpose**

The purpose of the Association shall be to own, construct, develop, operate, maintain and manage suitable facilities for the safe and healthful recreation of the Association's members, said facilities to include a swimming pool, and such other facilities as the Association may deem desirable. None of

net income or net earnings of the Association shall inure to the benefit of any member or of any individual.

**ARTICLE III – Number and Qualifications of Members**

1. Membership shall be open to bonafide residents (whether or not home owners) of the area within a three-quarter mile radius of the pool.
2. Membership in the Association may be extended to residents of other areas who shall have been recommended for membership by a member of the Association, provided, however, that members not resident in the areas described in (1) above shall not exceed thirty (30) per cent of the total membership.
3. Membership in the Association shall be granted applicants, qualified under (1) and (2) above, by an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose.
4. Applicants for membership elected as provided in (3) above shall upon payment of the initiation fee and the annual dues, and special assessments, if any, for the current year, be duly inscribed on the rolls of the Association. New members shall not, however, be subject to deficit assessments with respect to fiscal years in which they were not members.
5. A certificate of membership, in a form to be determined by the Board of Directors, shall be issued to each family unit.
6. Membership in the Association shall be limited to family units, which shall consist of one Senior Member and one or more Associate members.

(a) The Senior Member shall be the adult head of the family.

(b) 'Associate member' shall include and be limited to the spouse of the Senior Member, his natural and adopted children and legal wards, if unmarried, and adult relatives of the Senior Member if legally and permanently residing with him as an integral part of his household.

7. Membership shall be limited to 325 family units.

#### ARTICLE IV – Initiation Fee, Dues and Assessments

1. An initiation fee of \$375 shall be paid by each family unit joining the Association on or after November 11, 1964.

2. Annual dues shall be paid by each family unit to the Association at the following rates:

(a) a family unit with four Association members or less, \$50.00

(b) a family unit with five Association members, \$55.00

(c) a family unit with more than five Associate members, \$60.00

3. (a) A deficit assessment to cover a deficit in the previous season's operations may be levied on each member by the Board of Directors and, if levied, shall be announced at the annual meeting and in a notice sent by mail to the membership as soon after the annual meeting as possible.

(b) A special assessment for any other purpose shall only be levied by a majority vote of the membership present at the annual meeting or at a special meeting called for the purpose.



4. A family unit whose full annual dues have not been paid within six months after the beginning of the fiscal year, or which is more than ninety days in arrears in paying deficit or special assessment, may be dropped from the rolls after 10 days notice of such arrears by mail, by action of the Board of Directors.

5. The fiscal year of the Association shall begin on the first day of October of each year.

#### ARTICLE V – Inactive and Temporary Members

1. A family unit which cannot use the pool and other facilities of the Association may, at the discretion of the Board of Directors, be designated an Inactive membership for a given fiscal year. Application for such status shall be made in writing to the Board of Directors on or before May 15, of that year.

Inactive members shall not be liable for future deficit assessments levied to cover the period of operation during which they are in such inactive status, but the Senior Member of such family unit shall pay to the Association in advance a fee of \$15.00 per year for the privilege of having his family unit designated an Inactive membership; provided however, that such annual fee shall not be payable by a Senior Member granted Inactive membership by reason of his service in the Armed Forces of the United States on active duty overseas.

No membership shall be designated an Inactive membership for more than three (3) consecutive years, except for good cause shown, and with the approval of two-thirds of the entire membership of the Board of Directors.

2. Temporary memberships, equal in number to those on inactive status, may at the discretion of the Board of

Directors — be extended in sequence to applicants from the list of those applying for regular membership. Such temporary membership shall, upon the payment of a fee set by the Board of Directors and deficit assessments (if any) entitle the temporary member to the same rights privileges and obligations — other than voting, as regular members, and to succeed to the next vacancy in the regular membership of the Association upon payment of proper fees and assessments.

3. At times when the membership rolls are full, applicants for membership shall be limited to the areas set forth in Article III, Section 1, and such applications shall be considered in chronological order of receipt. Such listing shall constitute a waiting list.

4. The privilege of temporary membership, set forth in Article V, Section 2, shall be available in sequence to applicants on the waiting list set forth in Section 3 above in order of seniority.

5. Applicants on the waiting list, when offered membership (temporary or full), must indicate, in writing, accompanied by the necessary fees, their acceptance within 10 days of such offer or such offer is to be submitted to the next person on the waiting list. A second offer of membership to an applicant must be accepted or the applicant's name, may at the option of the Board be placed at the bottom of the waiting list.

6. Persons applying for membership after the rolls are full must accompany such applications with a \$5.00 fee. This fee is to be considered part of the required fees and dues for membership and is not to be returned unless the person moves from the areas of Article III, Section 1, before being offered a membership.

## **ARTICLE VI – Resignation of Membership**

A member in good standing who wishes to resign from the Association shall inform the Secretary in writing of his decision. If the Association has a waiting list, the Board of Directors shall repurchase the membership with funds provided by the resale of the membership by refunding not less than ninety per cent (90%) of the initiation fee in effect at the time of resignation, less any deficit assessments covering any periods of operation during which he was an active member, and annual dues or special assessments due the Association; provided, however, that if the resignation is to become effective before the swimming season opens, he shall not be liable for payment of annual dues for the next swimming season. If no waiting list exists, the Board of Directors may, at its option, repurchase the membership for eighty per cent (80%) of the initiation fee in effect at the time of the resignation, less amounts due the Association as outlined above. The procedure with respect to members who are dropped from the rolls by appropriate action of either the Board or the membership shall be the same as set forth herein for members who resign. In any case where a member sells his property, the purchaser thereof may have the first option to purchase the membership of the seller solely from the Association at a rate equal to the initiation fee in effect at the time of the sale; provided, however, that the seller forwards a written resignation to the Association, and the purchaser makes a formal written application for membership to the Board of Directors within a reasonable period. Such membership application shall be subject to the approval of the Board of Directors.

A resignation by the seller shall not be considered as a vacancy within the meaning of Article V, paragraph 2.

## **ARTICLE VII — Membership Privileges**

1. Only members of the Association shall be entitled to use the Association's pool and other facilities without the payment of other than annual dues and deficit assessments and special assessments, subject to such rules as the Board of Directors may from time to time adopt.

2. The use of the pool and other Association facilities by non-members and the children of non-members shall be subject to such rule as the Board of Directors may from time to time adopt.

## **ARTICLE VIII — Principal Office and Resident Agent**

1. The principal office of the Association shall be located at the site of the swimming pool.

2. The President of the Association shall be its resident agent.

3. The books and records of the Association shall be kept at the principal office unless in the hands of an officer, the general counsel or accountant on official Association business.

## **ARTICLE IX — Meeting of Members**

1. The annual meeting — The annual meeting of the members of the Association shall be held during the second week in November of each year, commencing with the calendar year 1961, at a time and place to be designated by the Board of Directors. Members shall be notified of this meeting in writing not less than twenty (20) days prior thereto. At such meeting the members may nominate from the floor and elect directors to the Board of Directors and transact such other business as may properly come before it. Any business to be brought before the membership at

the annual November meetings, whether it shall constitute "old" or "new" business, must be submitted in writing to the Board of Directors, not sooner than 60 days or less than 30 days prior to the said November annual meeting.

2. Special Meeting — A special meeting of the members of the Association may be called at any time by the Chairman of the Board of Directors, provided the Chairman first obtains consent in writing of not less than fifteen (15) members. A special meeting shall be called by the Chairman upon the request in writing of not less than twenty (20) per cent of the members or two-thirds (2/3) of the members of the Board of Directors. Due notice of special meetings shall be given to the members, in writing, not less than ten (10) days prior thereto. The purpose for which a special meeting is called shall be stated in the notice of said meeting, and no other business shall be entertained or transacted at this meeting.

3. A quorum shall consist of representatives of not less than ten (10) per cent of the family units constituting the membership. If no quorum is present, an adjournment shall be taken to a date not fewer than seven (7) nor more than fifteen (15) days thereafter, and the members present at any such later meeting shall constitute a quorum, regardless of the number of members present. A five (5) day notice shall be given for the later meeting.

4. Parliamentary Rule — The business transacted at all meetings of the Association and the Board of Directors shall be pursuant to the Rules of Order recommended for the use in business meetings of REA Coops as set forth in REA Bulletin 101-2 (Electric) reprinted in November 1955 by the Government Printing Office; except when said rules conflict with statute, the charter, or the By-Laws.



**ARTICLE X – Board of Directors**

1. The Board of Directors shall consist of fifteen (15) members all of whom (with the exception hereafter noted) shall be members of the Association at the time of their election. Exception: For the purpose of initially establishing the Association, the first Board of Directors shall consist of those persons who shall have actively participated in the work of the Swimming Pool Committee, or any subcommittee thereof and shall serve until the opening of the pool.

2. At the first annual meeting after the opening of the pool, there shall be elected by the members of the Association a new Board of Directors, five (5) of whom shall be elected for a term of one (1) year, five (5) shall be elected for a term of two (2) years and five (5) shall be elected for a term of three (3) years. Thereafter, at each annual meeting there shall be elected to the Board of Directors five (5) members, each to serve for a period of three (3) years.

3. Vacancies – In case of any vacancy in the membership of the Board of Directors, the remaining Directors by an affirmative vote of a majority may elect a successor to hold office until the next annual meeting, at which meeting a successor shall be elected to serve the unexpired portion of the term.

4. Absence of Directors – The Board of Directors, by a majority vote of its entire membership, may remove a director who is absent from three (3) consecutive regular meetings of the Board without valid reason, provided the Board notifies him in writing, at least five (5) days prior to a regular Board meeting of such contemplated action by the Board. Such action may be initiated only following at least two successive absences. The validity or



reasonableness of a directors explanation of absence shall be determined by the Board.

5. Place of Meeting – The directors shall hold their meetings at such place as may be designated by the Chairman of the Board with the agreement of a majority vote of the Board.

6. Meetings of the Directors – Regular meetings of the Board shall be held each month. Notices for such meetings shall be given to each director, in writing, at least five (5) days prior thereto. Special meetings of the Board may be called at any time by the Chairman of the Board provided he first obtains consent in writing of not less than four (4) directors. A special meeting shall be called by the Chairman upon request in writing of not less than six (6) directors, and due notice of such meeting stating the purpose thereof shall be given directors in writing not less than three (3) days prior thereto, excluding Sundays and holidays.

7. Quorum – A majority of the Board of Directors shall constitute a quorum for the transaction of business.

8. Absence of Chairman and Vice-Chairman – In the absence of the Chairman of the Board from a meeting the Vice-Chairman shall act in his place. In the absence of both the Chairman and Vice-Chairman a Director previously designated by the Chairman, may serve as acting Chairman. If no acting Chairman has been designated the directors attending the meeting from which both Chairman and Vice-Chairman are absent shall elect a temporary chairman.

9. Duties of the Board of Directors – In the Board of Directors shall be vested the authority for the general direction and control of the affairs of the Association. In

addition to the duties customarily performed by the boards of directors, the Board of Directors shall:

- a. Act upon application for membership;
- b. Fix the amount and character of, and approve, surety bonds required of any persons handling or having custody of funds;
- c. Fill vacancies in the Board of Directors as herein provided;
- d. Employ, fix the compensation, and prescribe the duties of such employees as may, in the discretion of the Board, be necessary;
- e. Establish and approve rules and regulations for the safe and convenient use of the Association's facilities, and inform all members and other authorized users of the facilities of such rules and regulations;
- f. Appoint one of its own members to be the contracting officer of the Association and to have such duties and authority as shall be granted from time to time by the Board by specific resolution;
- g. Authorize and supervise investments of the Association;
- h. Designate the depository or depositories for funds;
- i. Each year recommend the amount of annual dues payable by members of the Association, as well as recommend the amount of any special fees or assessments deemed necessary for satisfactory operations of the Association, and establish the amounts of any necessary deficit assessments;
- j. Call annual and special meetings of the members of the Association, as herein provided, and establish the time and place of such meetings;

k. Constitute and appoint committee, and define the duties and powers of the same;

l. Cause the books of the Association to be audited annually by auditors selected by the Board, such audit to be performed by persons who shall neither be Directors nor Officers of the Association;

m. Be responsible for causing a written report of the afore-mentioned audit to be handed to each member of the Association in person, or mailed to each member, in advance of the annual meeting of the Association;

n. Appoint a general counsel who shall advise on matters of legal import concerning the Association;

o. Rule on all questions of interpretation of the By-Laws.

10. In addition to the powers provided herein, the Board of Directors shall have such other powers, not inconsistent with these By-Laws or existing statutes, as are necessary for the efficient operation and management of the Association.

11. Informal Action of Directors — Any action required or permitted to be taken at any meeting of the Board of Directors may be taken without a meeting if written consent to such action is signed by all directors (either prior to or following the specific action) and such written consent is filed promptly with the minutes of the proceedings of the Board of Directors.

12. Compensation of Directors — The Directors shall receive no remuneration for their services as directors and shall not otherwise be gainfully employed by the Association.

## ARTICLE XI – Officers

1. Selection – At the first meeting of the Board of Directors following the annual meeting of the members of the Association, the Board shall elect officers for the ensuing year. The officers shall be as follows: President (who shall also serve as Chairman of Board of Directors), Vice-President ( who shall also serve as the Vice-Chairman of the Board of Directors), Secretary, Assistant Secretary, Treasurer and Assistant Treasurer – each of whom shall serve for one year. No person may hold more than one of these offices at a time, nor shall any person hold the same office for more than two consecutive terms. The President and Vice-President shall be elected from among the Directors. Officers must be members of the Association at the time of their election.

2. Powers and Duties of the President – The President shall preside at all meetings of the members of the Association. He shall have power to sign certificates of membership, to sign and execute all contracts and instruments of conveyance in the name of the Association and to appoint and discharge agents and employees; subject to the approval of the Board of Directors. He shall have general and active management of the business of the Association, and shall perform all duties usually incident to the office of a president. The President shall execute the mandates of the Board of Directors.

3. Powers and Duties of the Vice-President – The Vice-President shall have such powers and perform such duties as may be delegated to him by the President. In the absence or disability of the President, he shall perform the duties and exercise the powers of the President.

4. Powers and Duties of the Secretary — The Secretary shall keep the minutes of all meetings of the Board of Directors, or the members of the Association, and of any other meetings to which the Secretary is designated by the Chairman of the Board of Directors to attend, in books provided for the purpose; he shall attend to the giving and serving of all notices; he shall sign with the President, or with the Vice-President, in the name of the Association, all contracts and instruments of conveyance, and shall affix the seal of the Association thereto; he shall keep charge of the books of certificates of membership, and such other books and papers as the Board of Directors may direct, and he shall perform in general all the duties incident to the office of secretary, subject to the control of the Board of Directors. He shall submit such reports to the Board as may be requested by them.

5. Powers and Duties of the Assistant Secretary — The Assistant Secretary shall have such powers and perform such duties as may be delegated to him by the Secretary. In the absence or unavailability of the Secretary, the Assistant Secretary shall exercise the powers and perform the duties of the Secretary.

6. Powers and Duties of the Treasurer — The Treasurer shall have custody of all funds and securities of the Association which may come into his hands; when necessary or proper he shall endorse on behalf of the Association for collection all negotiable instruments and shall deposit the same to the credit of the Association in such bank or banks as the Board of Directors may designate. Whenever required by the Board of Directors, he shall render a statement of the financial condition of the Association; he shall cause to be entered to be entered regularly in the books of the Association, to be kept for that purpose, a full and accurate account of the Association. He shall perform all



acts incident to the position of treasurer, subject to the control of the Board of Directors.

7. Powers and Duties of the Assistant Treasurer – The Assistant Treasurer shall have such powers and perform such duties as may be delegated to him by the Treasurer. In the absence of unavailability of the Treasurer, the Assistant Treasurer shall exercise the powers and perform the duties of the Treasurer.

8. The Treasurer and Assistant Treasurer shall be bonded in such amount as the Board of Directors may require and the Association shall pay the necessary premiums for such bonds.

#### ARTICLE XII – General Counsel

1. The Association at all times shall have a General Counsel.

2. The General Counsel must be a member in good standing of the bar of the State of Maryland and a bona fide resident of Montgomery County, Maryland.

3. The General Counsel of the Association shall be appointed by the Board of Directors at their meeting following the annual meeting of the members of the Association.

4. The General Counsel shall advise the Board of all matters of legal import concerning the Association and shall pass upon the papers obligatory of the Association before they are executed by the Association.

#### ARTICLE XIII – Committee

1. The Board of Directors may provide for such committees as it deems necessary and define their powers and duties.



2. The Chairman and Vice-Chairman shall be members, ex officio, of all committees.

#### ARTICLE XIV – Notices, Waivers, and Voting

1. Notices to be Mailed – All notices mentioned in these By-Laws shall be mailed to the address of the person entitled thereto shown on the books of the Association, and the mailing of same, postage prepaid, shall constitute good notice.

2. Waivers of Notice – Whenever any notice whatever is required to be given by law, or under the provisions of the Certificate of Incorporation or of these By-Laws, a waiver thereof in writing, signed by the person or persons entitled to said notice, whether before or after the time stated therein, shall be deemed equivalent thereto unless such waiver is expressly prohibited by law.

3. Voting – At meetings of the members of the Association, each holder of a certificate of membership, duly registered in his name in the books of the Association at least fifteen (15) days prior to any such meeting, may cast one vote. It shall be the duty of the Secretary to prepare and make, at least five (5) days before every election, a complete list of members of the Association entitled to vote and such a list of members of the Association shall be open for inspection by any member and shall be produced at the time and place of such election and kept there until the election is concluded. The President shall appoint inspectors and tellers as required. A nominating committee shall be formed consisting of the four officers of the Board of Directors and one member from each existing standing committee appointed by the Chairman of these committees. A list of nominees shall be distributed to each senior member at least ten (10) days prior to elections. Nominating may also be made by the members

provided said nominations are received by the Secretary or Assistant Secretary at least fifteen (15) days prior to the annual meeting of the Association.

#### ARTICLE XV – Amendment of By-Laws

1. Amendment by members. A By-Law may be amended or repealed, or a new By-law may be enacted by action of the members of the Association, provided that notice of the proposed amendment, new By-law or repeal is mailed to each member of the Association together with a notice of the meeting at which the proposal shall be considered, and provided further that (a) the proposal shall receive the majority vote of the entire membership present or (b) the vote of the majority of the membership at the meeting and at the next successive meeting.

2. Amendments by Board of Directors – Amendments to these By-Laws may also be adopted by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors at any duly held meeting thereof. Amendments thus adopted shall be effective until and unless they be rejected by a majority vote of the members present and voting at a duly held association meeting. Members shall be given proper notice of any and all amendments adopted by the Board of Directors, such notice to be given within twenty (20) days of adoption of an amendment.

#### ARTICLE XVI – Miscellaneous

1. Execution of Corporate Papers – All written obligations of the Association shall be executed by the President or the Vice-President and Secretary or Assistant Secretary and shall be solemnized by affixing the Corporation seal. No obligation in writing of the Association failing to have the required signature or the Corporate Seal shall be binding upon the Association, with the exception of the option

for purchase entered into by the President for the pool land.

2. Authority to Execute Papers – No obligation on the part of the Association shall be entered into without the approval of the Board of Directors first hand and obtained except as to matters involving less than One Hundred Dollars (100.00).

3. Corporate Books and Records – Corporate Books and Records shall be open to inspection by members at such time as may be reasonably fixed by the President and such inspection shall take place at the customary place of keeping said books and records.

4. Corporate Seal – The Corporate Seal shall have inscribed thereon the name of the Corporation, the year of its organization, and words "Corporate Seal" and Maryland. The Corporate Seal shall be kept by the Secretary.

5. Annual Report – The Board of Directors shall cause to be prepared and transmitted to each member of the Association, at least twenty (20) days in advance of the annual meeting of the members of the Association, a statement of financial condition of the Association covering the previous fiscal year, and a consolidated balance sheet showing the assets and liabilities of the Association.

6. Dividends and Refunds – There shall be no dividends to members of the Association. There shall be no refunds to members except as may specifically be provided in these By-Laws.

7. Lost Certificate – Any person claiming a certificate of membership to be lost or destroyed shall make an affidavit or affirmation of that fact, whereupon, after the expiration of 30 days from the filing of such affidavit or

affirmation with the Secretary or the Association, a new certificate shall be issued which shall bear on its face language to the effect that the same is a substitute issued in place of a lost or destroyed certificate.

8. Checks of the Association — Checks shall bear the signature of any one of the following combinations of officers: The President plus the Treasurer or Assistant Treasurer; or the Vice-President plus the Treasurer or Assistant Treasurer.

9. Singular Includes Plural, etc. — Wherever in these By-Laws reference is made to the singular or the masculine gender, such reference shall apply to the plural and the female gender with equal force whenever the context requires the same.

10. Acquisition or sale of Land. The Association shall not acquire or dispose of any real property or interest in real property, incur same, or grant an easement or the like, except in accordance with such approval as may be granted by a majority of the members voting on such proposition at a regular or special meeting of the members.

11. Each person who acts as a Director or Officer of the Association shall be indemnified by the Association against expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party by reason of his being or having been Director or Officer, except in relation to matters as to be liable for gross negligence or willful misconduct in the performance of his duties.

12. Any question as to the meaning or proper interpretation of any provision of these By-Laws shall be determined by a majority vote of the Board of Directors.

13. Reference herein to age of junior, or associate members shall be the age attained as of January 1st of the current year.

14. For due cause a member may be suspended for a specific period of time or expelled after notice of the basis for such proposed action, a hearing before the Board of Directors, and the affirmative vote of two-thirds (2/3) of the entire membership of that Board. In case of expulsion, the membership shall be disposed of in accordance with the procedure set forth in Article VI. Due cause for suspension or expulsion shall, in general, consist of violation of these By-Laws or rules of the Association or of conduct detrimental to the membership.

15. (a) No beverage subject to tax under Chapter 51 of the Internal Revenue Code of 1954 (distilled spirits, wines, and beer) shall be served or permitted to be consumed on any premises under the control of the Association.

(b) No dining facilities (other than facilities for light refreshment), and no dancing facilities, will be provided on any premises under the control of the Association.

(c) Children are permitted to use the swimming facilities on the basis of their own membership or the membership of the adult.

16. The Association assumes no responsibility, and members (of any class) or their guests can have no claim against the Association, for either personal injury or property loss except to the extent covered by insurance.

---



**APPLICATION NO. B-243  
FOR AMENDMENT TO THE  
ZONING ORDINANCE TEXT**

**County Council for Montgomery County  
Applicant**

**OPINION**

**Ordinance No. 3-28**

**May 24, 1955**

The Council, by this action, sets up the community swimming pools as a special exception, thus giving the Board of Appeals the authority to consider the various applications and the locations of the proposed swimming pools. The Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefitted by such development. However, the Council also feels that it is necessary that property owners in the various areas be protected against the invasion of their privacy and against any adverse effects that community swimming pools may have on the residential character of an area. Accordingly, it believes that an opportunity should be afforded such property owners to state their position and opposition, if any, to the construction of a swimming pool in their particular areas. It is also necessary that the Board of Appeals have the opportunity to require various conditions and restrictions on use of a piece of property for a swimming pool. It is believed that in this manner the best interests of the whole community can be served. Furthermore, it is noted that while a requirement that the Board find that construction of a swimming pool will not adversely affect the character of a neighborhood, the Council, at the same time, removes the greater restrictions that exist in section 176-26a of the



Code. The Council also has added the provision which permits the Board of Appeals to require when necessary that a showing of financial responsibility on the part of the applicant must be met. In this way, the Council believes that the development of the community swimming pool movement in Montgomery County will be aided and, at the same time, protection will be afforded to property owners who may be adversely affected by the construction of community swimming pools.

The Maryland-National Capital Park and Planning Commission recommends approval of this text amendment but questions the advisability of making swimming pools a special exception in the industrial zone.

For these reasons, and to aid in the accomplishment of a coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District, the application will be granted with modifications as discussed above.

\* \* \* \* \*

A True Copy

ATTEST:

/s/ William B. McKinney  
William B. McKinney, Clerk  
County Council for Montgomery  
County, Maryland

I hereby certify that the foregoing  
is a true and correct copy.

/s/ David B. Collier  
Clerk, Montgomery County Council

EXCERPTS FROM  
APPENDIX

---

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1969

---

No. 33

---

PAUL E. SULLIVAN, ET AL.,  
*Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

---

T. R. FREEMAN, JR., ET AL.,  
*Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.,

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF APPEALS OF VIRGINIA

---

[27]

\* \* \* \* \*

**EXHIBIT B****LITTLE HUNTING PARK, INCORPORATED  
FAIRFAX COUNTY, VIRGINIA****REVISED BY-LAWS****April 18, 1961****ARTICLE I - Name**

The name of this organization shall be Little Hunting Park, Incorporated, hereinafter to be referred to as the Corporation.

**ARTICLE II - Purpose**

The purpose of the Corporation shall be to own (or lease), construct, develop, operate, maintain and manage suitable facilities for the safe and healthful recreation of the Corporation's members, said facilities to include a swimming pool, a park, and such other appurtenances as the Corporation may deem desirable.

**ARTICLE III - Membership**

Section 1. Membership in the Corporation is—

a. Established by the purchase of a certificate of membership; and

[28]

b. Maintained in good standing by the prompt payment of all charges and assessments; and

c. Limited to persons who reside in, or who own, or who have owned housing units in the subdivisions presently

defined and known as Bucknell Manor, Beacon Manor, White Oaks, and Bucknell Heights, and such other area(s) as may be authorized by the Board of Directors; and

d. Limited to six hundred (600) in number, except that, exclusive of all other provisions herein, there shall be forty (40) memberships available to residents of the subdivision known as White Oaks over and above the number of White Oaks memberships of record as of May 1, 1955.

Section 2. Each application for membership must be made in writing, and must be approved by the Board of Directors. In the sale or resale of memberships by the Corporation, applications by residents of the subdivisions specifically named in Section 1.c. shall be given prior consideration before all others.

Section 3. Each membership in the Corporation shall be issued to one adult person. If said person be a member of a family unit, the membership, maintained in good standing, shall entitle all members of the family unit to utilize the Corporation's facilities. A family unit is defined as all persons of the same immediate family, including all persons dependent on the holder of a membership and who permanently reside in the same housing unit.

Section 4. Irrespective of the type or number of memberships held by one person, no member shall have more than one vote in the affairs of the Corporation.

Section 5. Memberships may be transferred, or assigned for temporary use, as follows:

a. Permanent transfer to another eligible person may be effected.

b. The use of the membership may be temporarily assigned to eligible persons for periods not to exceed one year. Reassignment to such eligible persons is permissible.

[29]

c. Transfers and assignments of memberships must be by written instrument in such form as prescribed by the Board of Directors and are subject to approval by the Board.

Section 6.

a. A membership may, for due cause, and after having been granted an opportunity for a hearing, be suspended for a specified period of time or expelled from the Corporation by a two-thirds ( $2/3$ ) vote of the entire membership of the Board of Directors.

b. Due cause for suspension or expulsion of a member shall consist of delinquency in payment of any charges and assessments, or of violation of these By-Laws or the Corporation's rules and regulations or of conduct inimicable to the Corporation's members.

c. Suspension or expulsion shall not operate to relieve a member of any liability to the Corporation. In the event of expulsion, the Corporation shall offer the membership for sale at the stated price (Article VI, Section 2.n.). The expelled member shall be paid the balance, if any, of the proceeds of such sale after deducting therefrom any indebtedness due the Corporation, plus a reasonable fee to cover expenses of the sale.

#### ARTICLE IV - Meetings

Section 1. The annual meeting of the Corporation's members shall be held each year during the month of October at a time and place determined by the Board of Directors.

Section 2. Special meetings of the Corporation's members may be called at any time by the Board of Directors, and shall be called by the Board of Directors within fifteen (15) days of the receipt of the written request of not fewer than twenty (20) members.

Section 3. At least seven (7) days before the date of any annual or special meeting of the members, the Secretary shall cause written notice thereof to be handed to each member in person, or mailed to each member at his address as it

[30]

appears on the records of the Corporation. Written notice of a special meeting shall state the purpose of the meeting and no other business may be conducted.

Section 4. Members, in good standing and not suspended, shall be entitled to vote in the affairs of the Corporation as such affairs are brought before a duly held meeting. There shall be not more than one vote per family unit.

Section 5. At an annual or special meeting twenty (20) members eligible to vote shall constitute a quorum. If no quorum is present, an adjournment may be taken to a date not fewer than seven (7) nor more than fifteen (15) days thereafter, and the members present at any such later meeting shall constitute a quorum, regardless of the number of members present. The same notice shall be given for the



later meeting as is prescribed in Section 3 (of this Article) for the original meeting.

Section 6. The order of business at annual meetings shall be:

- a. Ascertainment that a quorum is present;
- b. Reading and approval (or correction) of the minutes of the last meeting;
- c. Report of the Treasurer;
- d. Report of the President;
- e. Unfinished business;
- f. New business;
- g. Elections;
- h. Adjournment;

Except that the members assembled at any annual meeting may suspend the above order of business upon a two-thirds (2/3) vote of the members present at the meeting.

Section 7. Except as otherwise provided in the By-Laws (Roberts' Rules of Order Revised) shall be observed in the conduct of all meetings.

[31]

#### ARTICLE V - Board of Directors

Section 1. The Board of Directors shall consist of nine (9) members, all of whom shall be members of the Corporation.

Section 2. The first Board of Directors shall be comprised of three members each elected for a term of one

year, three members each elected for a term of two years, and three members each elected for a term of three years. Thereafter, at each annual meeting, there shall be elected to the Board of Directors three members each for a term of three years.

Section 3. Any vacancy on the Board of Directors shall be filled by a majority vote of the remaining Directors; but the Director so elected shall hold office only until the qualification of a Director who shall be elected at the next annual meeting of the members of the Corporation, to complete the unexpired term.

Section 4. If a Director fails to attend regular meetings of the Board of Directors for three consecutive months, or otherwise fails to perform any of the duties devolving upon him as a Director, the Board may, after granting the Director an opportunity for a hearing, declare his office vacant and fill the vacancy as herein provided.

#### ARTICLE VI - Duties of the Board of Directors

Section 1. The Board of Directors shall meet regularly at least once each month. The time and place of such meetings shall be fixed by the Board. The president, or in his absence the Vice-President, may call a special meeting of the Board of Directors, and shall do so upon the written request of three (3) or more Directors. The Secretary shall cause written notice of all meetings of the Board of Directors to be handed to each member of the Board in person, or be mailed to each at his address as it appears on the records of the Corporation. Whenever any notice whatever is required to be given by law, or under the provisions of the certificate of incorporation or of these By-Laws, a waiver

## [32]

thereof in writing, signed by the person or persons entitled to said notice, whether before or after the time stated therein, shall be deemed equivalent thereto. For any meeting of the Board of Directors, five (5) Directors shall constitute a quorum.

Section 2. The Board of Directors shall be vested with authority for the general direction and control of the affairs of the Corporation. In addition to the duties customarily performed by Boards of Directors, shall:

- a. Act upon all applications for membership;
- b. Fix the amount and character of, and approve, surety bonds required of any persons handling or having custody of funds;
- c. Fill vacancies in the Board of Directors as herein provided;
- d. Employ, fix the compensation, and prescribe the duties of such employees as may, in the discretion of the Board, be necessary;
- e. Establish and approve rules and regulations for the safe and convenient use of the Corporation's facilities, and inform all members and other authorized users of the facilities of such rules and regulations;
- f. Designate and maintain a registered office and a registered agent;
- g. Authorize and supervise investments of the Corporation;
- h. Designate the depository or depositories for funds;

i. Fix the amount of all charges and assessments payable by the members of the Corporation, as well as fix the amount of any fees for use of the Corporation's facilities by non-members;

j. Call annual and special meetings of the members of the Corporation, as herein provided, and establish the time and place of such meetings;

[33]

k. Constitute and appoint committees, and define the duties and powers of the same;

l. Cause the books of the Corporation to be audited annually by auditors selected by the Board, such audit to be performed by persons who shall neither be Directors nor Officers of the Corporation;

m. Deliver to each member a written report of the affairs of the Corporation after the end of each fiscal year;

n. Establish, from time time, the stated price at which memberships will be offered for sale or resale by the Corporation.

Section 3. In addition to the powers provided herein, the Board of Directors shall have such other powers, not inconsistent with these By-Laws or existing statutes, as are necessary for the efficient operation and management of the Corporation.

#### ARTICLE VII - Officers and Their Duties

Section 1. The Officers of the Corporation shall be a President, a Vice-President, a Treasurer, and a Secretary, all of whom shall be elected by the Board of Directors, the

President being elected from their number. Unless sooner removed as herein provided, officers shall be elected at the first meeting of the Board of Directors following the annual meeting of the members, to hold office from January 1st of the next succeeding year, for a term of one (1) year or until the election and qualification of their respective successors.

**Section 2. The President shall:**

- a. Be the administrative officer of the Corporation;
- b. Preside at meetings of the members and at meetings of the Board of Directors;
- c. Perform such other duties as customarily appertain to the office of President or as he may be directed to perform by resolution of the Board of Directors not inconsistent with these By-Laws or existing statutes.

[34]

**Section 3. The Vice-President shall have and exercise all the powers, authority, and duties of the President during the absence or disability of the latter.**

**Section 4. The Treasurer shall:**

- a. Have custody of all funds, securities, valuable papers, and other assets of the Corporation, subject to such limitations and control as may be imposed by the Board of Directors;
- b. Provide and maintain full and complete records of all the assets and liabilities of the Corporation;
- c. Prepare and submit to the Board of Directors, at times specified by same, financial statements showing the progress and condition of the Corporation;

d. Prepare such financial reports and tax returns as are required by law.

Section 5. The Secretary shall prepare and maintain full and correct records of all meetings of the Board of Directors and of the members of the Corporation, including complete returns of all elections conducted in such meetings. He shall give or cause to be given, in the manner herein prescribed, proper notice of all meetings of the members; and he shall conduct all correspondence pertaining to his office.

Section 6. In addition to the specific enumerated duties of Officers as prescribed herein, any Officer shall perform such other duties as customarily appertain to his office or as he may be directed to perform by resolution of the Board of Directors not inconsistent with these By-Laws or existing statutes.

#### ARTICLE VIII - General

Section 1. The Corporation shall at all times maintain in force planned insurance coverage.

##### Section 2.

a. Amendments to these By-Laws may be adopted by the affirmative vote of two-thirds (2/3) of the members

[35]

of the Board of Directors at any duly held meeting thereof. Amendments thus adopted shall be effective until and unless they be rejected by majority vote of the members present and voting at a duly held Corporation meeting. Members of the Corporation shall be given proper notice of any and all amendments adopted by the Board of Directors,



such notice to be given within thirty (30) days of adoption of an amendment.

b. Amendments to these By-Laws may be adopted by the affirmative vote of two-thirds (2/3) of the members present and voting at a duly held meeting of the Corporation.

Section 3. In addition to any other provision(s) in these By-Laws, any Director or Officer of the Corporation may be removed from office by the affirmative vote of two-thirds (2/3) of the members present at a special meeting held for the purpose, but only after an opportunity to be heard has been given him.

Section 4. When any Officer is absent, disqualified, or otherwise unable to perform the duties of his office, the Board of Directors may designate another member of the Corporation to act temporarily in his place.

Section 5. Reports to the Board of Directors by any duly appointed committee shall be presented in writing, signed by the acting chairman and by the acting secretary, if any, of such committee; and all such reports shall become a part of the permanent records of the Corporation.

Section 6. All books of account, minutes of meetings, committee reports, and other records of this Corporation shall be available to the members of the Corporation.

Section 7. Each member of the Corporation shall be provided with a copy of these By-Laws without specific charge for same.

This is to certify that the attached copy of the revised By-Laws of Little Hunting Park, Inc. is as submitted by the Ad Hoc Committee for By-Laws Revision comprised of

[36]

H. J. Peake, Chairman, L. M. Courson, and W. D. Lincicone, as such revision was considered, revised further and adopted by the Board of Directors at a regular monthly meeting, held at 921 Cornell Drive, Alexandria, Virginia, on April 18, 1961, and the same is duly recorded in the minutes of the said meeting of that date.

/s/ John R. Hanley  
President

Attested:

/s/ Betty A. Armstrong  
Secretary

\* \* \* \* \*

[44]

**EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS**

**[1] VIRGINIA**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

**PAUL E. SULLIVAN, et al.,**

**Plaintiffs,**

**v.**

**In Chancery No. 22751**

**LITTLE HUNTING PARK, INC.,**

**et al.,**

**Defendants.**

**Fairfax, Virginia**

**Wednesday, March 22, 1967**

The above-entitled matter came on for hearing before Judge JAMES KEITH, in Courtroom No. 3, Wednesday, March 22, 1967, at 10:00 o'clock, A.M.

**APPEARANCES:**

Robert M. Alexander, Esquire  
Allison W. Brown, Esquire, and  
Peter A. Eveleth, Esquire,  
for the Plaintiffs.

John Charles Harris, Esquire,  
for the Defendants.

\* \* \*

[45]

[7]

PAUL E. SULLIVAN

plaintiff, was called as a witness in his own behalf, and after having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

**BY MR. BROWN:**

Q. Will you state your name and address, please? A. Paul E. Sullivan, 7113 Coventry Road, Alexandria, Virginia.

Q. What is your occupation? A. I am an analyst for the Defense Department.

Q. Are you married, Mr. Sullivan? A. I am married.

Q. How many children do you have, and what is their age range? A. I have seven children. They range from two and one-half to sixteen.

Q. Will you state how you first became a member of the Little Hunting Park, Inc. and at what time? A. Well, we moved into Bucknell Manor, in the house that is now

6810 Quander Road in the last month of 1950, and in May, 1955, when Little Hunting Park, Inc. was being formed, we purchased a share so our children would be able to make use of the facilities of Little Hunting Park, and I retained that membership to this point. Later, we moved from—

[8] Q. Just one second. That share you purchased for what price? A. I believe it was \$150.00.

\* \* \* \* \*

[119]

[182]

VIRGINIA MOORE

was called as a witness on behalf of the plaintiff, and after having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. EVELETH:

Q. Would you please state your name and address? A. Virginia Moore, 6417 Olmi-Landrith Drive, Alexandria, Virginia, in Fairfax County.

Q. Mrs. Moore, were you president of Little Hunting Park during the entire year of 1965? A. I was.

Q. Were you a member of the board of directors during that entire period? A. I was.

Q. Have you held any other positions or offices with Little Hunting Park, Inc.? A. I was a member of the board of directors for four years. I was assistant treasurer two years, and vice president for one year, and president for one year.

Q. Could you give me the years? Do you remember? A. It was just previous. It was consecutive until [183] 1965. The first two years I was assistant treasurer. The third, I was vice-president, and the fourth year I was president.

\* \* \* \* \*

[127]

Q. How many times have applications for membership in Little Hunting Park been denied by the board of directors from its incorporation to the present? A. I do not know. Q. I show you Answer 5 to the interrogatories.

THE COURT: She said she did not prepare that.

MR. EVELETH: She may be aware of this fact though, [198] You may refresh your recollection. She must have known. She was vice president and president and everything else.

THE WITNESS: I still did not have the records.

BY MR. EVELETH:

Q. Are you aware of any? A. Any what?

Q. Any denials of membership applications. A. No, I am not.

Q. The answer to the interrogatory stated—

THE COURT: I don't think that is evidence. That was asked for your information and in the preparation of the case. Isn't that right?

MR. EVELETH: I feel it is an admission on the part of the corporation.

THE COURT: You can't prove it by this witness, apparently.

MR. EVELETH: It is an admission by the corporation. She is a member of the corporation. She is liable.

THE COURT: I don't think it is the right way to do it. If you want to read it into the record, and Mr. Harris doesn't object. Do you want it into the record?

MR. HARRIS: I don't know what he is going to do.

MR. EVELETH: (Reading) "The records of the corporation do not always reflect denial of membership. However, in May, 1961 an application was denied but the record does not disclose the [199] reason for such denial. And in our interrogatories, we asked how many applications

were denied for membership, and we asked for the dates, the times and under what circumstances and for what reason.

[161]

VIRGINIA MOORE

defendant, was recalled as a witness, and testified further as follows:

DIRECT EXAMINATION

BY MR. HARRIS: \*\*\*

[163]

Q. Do you know how many members you have in Alexandria City? A. In Alexandria City, there are, I think, about eleven, sixteen on here.

[302] Q. How many do you have that are not in the area specified in the bylaws and Alexandria City? How many are out of those two areas?

MR. EVELETH: I must object. I feel she is reading from that thing. She should use her recollection.

THE COURT: I believe she prepared it.

MR. EVELETH: I object. I don't think he has laid a proper foundation. He hasn't shown where she got that information from.

THE COURT: She made a study.

MR. EVELETH: It doesn't mean anything to me.

THE COURT: You may cross examine on it.



[164]

BY MR. HARRIS:

Q. How many outside the area? A. 117.

\* \* \* \* \*

[205]

VIRGINIA .

[1]

IN THE CIRCUIT COURT OF  
FAIRFAX COUNTY

THEODORE R. FREEMAN, JR.,  
et al,

Plaintiffs,

vs.

In Chancery No. 22752

LITTLE HUNTING PARK, INC.,  
et al,

Defendants.

Fairfax, Virginia

Wednesday, April 12, 1967

\* \* \* \* \*

[216]

\* \* \* \* \*

[41]

PAUL E. SULLIVAN

was called as a witness on behalf of the plaintiffs, and after having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. BROWN: \*\*\*

[219]

\* \* \* \* \*

Q. Mr. Sullivan, in your examination of the membership records of the corporation, did you make any observations about the places of residence of the current members of the association? A. Yes, I did.

Q. Are you familiar with the four subdivisions that are [47] specified in the bylaws as constituting the area from which members are eligible? A. Yes.

Q. Are you also familiar with any expansions that have taken place in this area of eligibility? A. I am familiar with the expansion through 1965.

Q. Would you explain the basis, the area of eligibility from which the association draws its members? A. The area of eligibility is the area within which a person must live in order to purchase a share and as a stimulus for the purchase of shares by eligible persons, the privilege of being a guest to a member is denied to non-members in the area of eligibility. As a member who occasionally took guests, I maintained a current idea of what the area was because I did not want the people turned down.

Q. Has the area of eligibility been expanded from time to time? A. Yes, sir.

Q. By what means? A. The board of directors has ex-

[220]

tended the area of eligibility from the four subdivisions to the areas contiguous, and at this point they extend, as of 1965, they extended in a rather loaf shape around the pool

grounds, extending out, I would say, from the farthest point to about [48] a mile, a mile and a quarter or a mile and a half, and I don't believe there is anything beyond that.

Q. How do you know this fact about the size of the area? A. As I say, as a member this is made known.

Q. Did you ever examine corporate records? A. In 1965, when I was trying to find out the reasons and basis for the board's action, which I considered to be inimicable to my interest, I exercised my right under the bylaws to examine corporate records once and proceed again. I was later not permitted to do this. This was quite contrary to the bylaws, but in the minutes as I can recollect them, as I reviewed them, it was made very clear that this line of eligibility in which people could buy memberships if they so desired, and the line if they were not permitted to be guests, extended from the property of Little Hunting Park down past behind White Oaks, down to an area I called Stonehedge, past the high school.

Q. What high school? A. Groveton, beyond a parking lane to a ramp northwest and swinging down in an irregular area to along Oak Drive, but including both sides of that street, and down Beacon Hill Road and south to Quander Road and swinging down to Mount Vernon Boulevard and swinging south on Mount Vernon Boulevard and up to Rollins Drive and the houses on [49] both sides to Little Hunting Park. This line actually touched the property line of the corporation.

Q. In examining the membership records, did you make a count or a tally of the number of persons whose current residences are shown as being within the area of eligibility?

A. Yes, I made some notes.

Q. Will you tell us how many persons you determined lived within the area of eligibility of current memberships?

A. According to the cards I have now, there are 424 members who live now within the area of eligibility.

[221]

Q. How many persons, total number of persons, live presently outside of the area of eligibility? A. Total number outside is about 117.

Q. 117? Do the records reflect persons who moved or persons who lived within the area at the time they bought their membership shares and subsequently moved? A. Yes, the original address is lined out and this new address is written in. The original address for 92 of these 117 people were within the area of eligibility.

Q. These show that they later after buying their shares, later moved outside of the area of eligibility? A. Yes, and this would be in accordance with the bylaws.

Q. Do the records show further down how many people at the time they purchased their shares, lived outside of [50] the area of eligibility? A. It would appear that there could be as many as 25. Maybe some of these cards are replacements for previous cards, if a card got too worn, but I would say that 25 would be the maximum number of people who lived outside the area.

\* \* \* \* \*

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

INTERROGATORIES

Plaintiffs request that defendants answer separately and fully in writing under oath, pursuant to Rule 33 of the

Federal Rules of Civil Procedure, the following interrogatories, and that, within 15 days after service of these interrogatories upon them, they file the original of their answers with the Clerk of this Court and serve a signed copy of their answers upon Raymond W. Russell, 22 West Jefferson Street, Rockville, Md. 20850, attorney for the Plaintiffs. These interrogatories shall be deemed continuing until the time of trial.

1. Do you admit that the recreation facilities of Wheaton-Haven Recreation Association, Inc. (hereinafter "Wheaton-Haven") were constructed in 1958-1959 under a special exception granted on September 20, 1958, by the Montgomery County Board of Appeals, pursuant to the zoning ordinance of the Montgomery County Code?
2. Do you admit that the provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955?
3. Do you admit that in Ordinance No. 3-28, dated May 24, 1955, the Montgomery County Council stated "... this action sets up the community swimming pools as a special exception . . . The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."?
4. Do you admit that at the public hearings conducted in August 1958 by the Montgomery County Board of Appeals on Wheaton-Haven's application for a special exception, Wheaton-Haven's witnesses testified, in effect, as follows: the County was unsuccessfully approached to construct a pool, that in lieu of County action promoters of

Wheaton-Haven initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large? [Attach to your answers to these interrogatories a verified copy of Wheaton-Haven's application for the special zoning exception referred to in this interrogatory, along with verified copies of any letters or briefs submitted in support thereof.]

5. Do you admit that prior to granting the special exception, the Montgomery County Board of Appeals required Wheaton-Haven to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed?

6. Do you admit that during 1958, the promoters of Wheaton-Haven conducted an extensive membership drive in surrounding neighborhoods and communities, that a circular was published and distributed advertising the projected construction of the association's recreation facilities, and that on July 9, 1958, an open meeting was conducted by the promoters in the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, a governmental agency? If you deny part of this interrogatory, indicate what part you admit.

7. Do you admit that Wheaton-Haven is exempt from and does not pay federal or state income taxes under the provisions of the United States Internal Revenue Code, Section 501(c)(7), and Maryland Code, Art. 81, Sec. 88(g)(8)?

8. List and explain the nature of each and every licensing, inspection or regulatory law, ordinance or regulation



currently applicable to the recreation facilities operated by Wheaton-Haven that is not also generally applicable to all persons or property owners.

9. State the name and business address of the contractor and each and every subcontractor who worked on the construction of Wheaton-Haven's recreation facilities.

10. State the 15 major items (both manufactured and raw materials) used in the construction of Wheaton-Haven's recreation facilities, the name and address of the company from which they were purchased and, if different from the supplier, the name and address of the manufacturer or original producer.

11. State whether Wheaton-Haven's recreation facilities have been serviced, maintained or repaired at various times since their construction by contractors or subcontractors engaged for this purpose. Also state the name and business address of each and every such contractor or subcontractor.

12. State all products and supplies (both manufactured and raw materials) used by every contractor or subcontractor listed in the answer to the next preceding question for the purpose of equipping, servicing, maintaining or repairing Wheaton-Haven's recreation facilities, the name and address of the company from which such equipment, products and supplies were purchased, and, if different from the supplier, the name and address of the manufacturer or original producer.

13. In addition to the products and supplies listed in the answer to the next preceding question, list all other equipment, products and supplies that have been used, or are used, in equipping, servicing, maintaining or repairing

Wheaton-Haven's recreation facilities, the name and address of the company from which such equipment, products and supplies were or are purchased and, if different from the supplier, the names and address of the manufacturer or original producer.

14. State whether any food, beverage or non-food products are available for sale on Wheaton-Haven's premises. If the answer is affirmative, also answer the following:

- (a) State each and every product and the value of sales of each and every product in 1968 and 1969.
- (b) State the name and address of the supplier of each and every product and, if different from the supplier, the name and address of the manufacturer or original producer.

15. State the total number of Wheaton-Haven members as of March 1, 1968.

16. State each and every change in the list of members of Wheaton-Haven from March 1, 1968, through December 31, 1968, showing in connection therewith the following:

- (a) The date of such change;
- (b) The name and address of the individual involved;
- (c) Whether the change was a termination of membership or the admission of a new member, and if the latter, whether it was a regular membership or a temporary membership;
- (d) In the case of each and every admission to membership during the period specified, state the date when such person had formally applied for membership in Wheaton-Haven.

17. State the name and address of each and every person who has ever been denied membership in or an application for membership in Wheaton-Haven and the reason therefor.

18. State the name and address of each and every person who served on the board of directors of Wheaton-Haven during 1968, the period during which each person served, and the office each person held, if any.
19. State for the year 1969, the same information requested in Question 18.
20. State for the year 1970, the same information requested in Question 18.
21. State for the years 1968, 1969 and 1970, respectively, the name and address of Wheaton-Haven's membership chairman or membership committee chairman.
22. State the name and address of each and every person having custody of corporate records of Wheaton-Haven, including minutes of membership meetings, minutes of board of directors meetings, financial records, membership records, and guest records. Identify the person having custody of each type of record.
23. Do you admit that during 1968, Dr. and Mrs. Harry C. Press attempted to obtain membership in Wheaton-Haven?
24. State in what capacity Mr. Brian Carroll was authorized to act on behalf of Wheaton-Haven in 1968.
25. State in what capacity Mr. Philip S. Trusso was authorized to act on behalf of Wheaton-Haven in 1968.
26. Do you admit that during 1968, Mr. Brian Carroll, or Mr. Philip S. Trusso, or any other person or persons acting on behalf of Wheaton-Haven, refused to supply Dr. and Mrs. Harry C. Press with the appropriate application for membership, or otherwise acted in such a manner as to deny or discourage their membership in Wheaton-Haven?

27. If the answer to the next preceding question is in the affirmative, name each and every person who so refused and state the reason or reasons for the refusal.

28. State whether in 1968, it was the practice or policy of Wheaton-Haven not to admit Negroes to membership.

29. State whether in 1968, it was the practice or policy of Wheaton-Haven not to admit Negroes to its facilities as the guests of members.

30. State whether at the present time it is the practice or policy of Wheaton-Haven not to admit Negroes to membership.

31. State whether at the present time it is the practice or policy of Wheaton-Haven not to admit Negroes to its facilities as the guests of members.

32. List each and every meeting of the board of directors and membership of Wheaton-Haven held in 1968, 1969 and 1970 at which consideration was given to the practice or policy of the association regarding the admission of Negroes to membership, or their admission to the association's facilities as the guests of members. With respect to each such meeting, also answer the following:

- (a) Describe specifically the question or questions considered with respect to Negroes and the resolution thereof;
- (b) If the meeting was of the board of directors of Wheaton-Haven, list each and every director who was present;
- (c) [Attach to your answers to these interrogatories verified copies of all resolutions, reports, or other

materials which record consideration at the meeting of the practice or policy described in Question 32.]

33. Do you admit that at a meeting of the board of directors of Wheaton-Haven held on July 20, 1968, a motion was passed providing that henceforth guests using the association's facilities were to be limited to relatives of Wheaton-Haven members?

34. If the answer to the next preceding question is in the affirmative, do you admit that a reason for the adoption of the guest policy on July 20, 1968, was to prevent members from bringing Negroes as guests?

35. Do you admit that since July 20, 1968, no Negro has been permitted to use Wheaton-Haven's facilities as the guest of a member?

36. Do you admit that Wheaton-Haven has no Negro members?

37. Do you admit that there are Negro families residing within the geographic area from which Wheaton-Haven draws its members?

38. [Attach to your answers to these interrogatories, verified copies of the minutes of all Wheaton-Haven board of directors and membership meetings held in 1968, 1969 and 1970.]

Submitted by,

---

Raymond W. Russell  
22 West Jefferson Street  
Rockville, Md. 20850

Allison W. Brown, Jr.  
Suite 501, 1424 - 16th Street, N.W.  
Washington, D.C. 20036

Attorneys for Plaintiffs

---

[Certificate of Service]



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

ANSWERS TO INTERROGATORIES

The Defendants, Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, say:

8. We do not have the vaguest idea how to answer this question. We are not qualified to explain the nature of laws, ordinances, or regulations.

9. Gillespie and Company, Falls Church, Virginia. We are not aware of the names of the sub-contractors used.

10. This information would only be available from the contractor.

11. Durite Chemical Company, Inc., 3564 Bladensburg Road, Brentwood, Maryland, caulked the deck.

12. Durite Chemical Company, Inc.

13. Durite Chemical Company, Inc.

14. Candy and icecream are sold, and were purchased through Rockville Vending Machine Company and the Good Humor Ice Cream Company. These two companies have the amount sold.

15. Three Hundred Twenty-Five (325) families.

16. May, 1968, Three (3) new members. Henry Hallerman, regular membership. David Berry, regular membership.



Robert Larson, regular membership. December, 1968, 12 resignations. Robert Reeves, Jean Williams, Robert O'Neil, James Watkins, Martin Margolis, Andrew Goldstein, Marshall Becker, Bernard Leese, William J. Smith, William Horn, Maurice Kane, Michael Mendelaska.

17. Mrs. Lewis Papier, 12609 Laure Drive, Silver Spring, Maryland.

18. Mr. Philip Trusso, President  
 Mr. Robert Sager, Vice President  
 Mr. Bernard Katz, Treasurer  
 Mrs. Ellen Fenstermaker, Secretary  
 Mr. Robert Lane  
 Mr. Ernest McIntyre  
 Mr. Anthony DeSimone  
 Mr. Albert Friedland  
 Mr. James Welch  
 Mrs. June Hooks  
 Mrs. Lois Carrico (Resigned June 1968)  
 Mr. William Becker  
 Mrs. Joann Bennington  
 Mr. Sidney Plitman  
 Mr. James Whittles  
 Mr. Albert Timmons (Replaced Mrs. Carrico June 1968)

19. Mr. Bernard Katz, President  
 Mr. Robert Lane, Vice President  
 Mr. Brian Carroll, Treasurer  
 Mrs. Helen Abate, Secretary  
 Mr. Philip Trusso  
 Mr. Walter Smith  
 Mr. Albert Friedland  
 Mr. Anthony DeSimone  
 Mr. James Welch

Mr. Ernest McIntyre  
 Mr. William Becker (Resigned Jan. 1969)  
 Mr. Sidney Plitman  
 Mr. James Whittles  
 Mrs. Ellen Fenstermaker  
 Mrs. JoAnn Bennington (Resigned April 1969)  
 Mrs. Helen Abate (Replaced Mr. Becker March 1969)  
 Mr. Milton Rodes (Replaced Mrs. Bennington May 1969)

20. Mr. Bernard Katz, President  
 Mr. Ernest McIntyre, Vice President  
 Mr. Leonard DeMino, Treasurer  
 Mrs. Helen Abate, Secretary  
 Mr. Walter Smith  
 Mr. Albert Friedland  
 Mr. Sidney Plitman  
 Mr. James Whittles  
 Mr. Milton Rodes  
 Mr. Clarence Melcher  
 Mr. Anthony DeSimone  
 Mrs. Ellen Fenstermaker  
 Mr. Brian Carroll  
 Mr. James Welch  
 Mr. Robert Lane

21. None.

22. Mrs. Anthony Abate has the Minutes of the Corporation. Anthony J. DeSimone has the financial records, and Bernard Katz has the membership records. Guest lists are kept for one year only.

24. None.

25. President.

26. This is not a question framed for the purposes of discovery, but is rather a request for admissions of fact.

27. Does not apply.

28. We did not have a written policy but we did have an understanding to discourage negroes because we considered ourselves a private pool.

29. Same as No. 28.

30. Same as No. 28.

31. Same as No. 28.

33. Yes.

\* \* \* \* \*

[Certificate of Service]

---

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

[Caption omitted in printing]

**REQUEST FOR ADMISSION**

Plaintiffs request defendants Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, within 10 days after service of this request, to admit, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. The recreation facilities of Wheaton-Haven Recreation Association, Inc. (hereinafter "Wheaton-Haven") were constructed in 1958-1959 under a special exception granted on September 20, 1958, by the Montgomery County Board of Appeals, pursuant to the zoning ordinance of the Montgomery County Code.

2. The provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955.

3. In Ordinance No. 3-28, dated May 24, 1955, the Montgomery County Council stated "... this action sets up the community swimming pools as a special exception ... The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

4. At the public hearings conducted in August 1958 by the Montgomery County Board of Appeals on Wheaton-Haven's application for a special exception, Wheaton-Haven's witnesses testified substantially as follows: The County was unsuccessfully approached to construct a pool, that in lieu of County action promoters of Wheaton-Haven initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

5. Prior to granting the special exception, the Montgomery County Board of Appeals required Wheaton-Haven to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed.

6. During 1958, the promoters of Wheaton-Haven conducted a membership drive in surrounding neighborhoods and communities, in connection with which a circular was published and distributed advertising the projected construction of the association's recreation facilities.
7. As part of the Wheaton-Haven membership drive, on July 9, 1958, an open meeting was conducted by promoters in the Civic Auditorium of the Maryland-Nation Capital Park and Planning Commission, a governmental agency.
8. Wheaton-Haven is exempt from and does not pay Federal or state income taxes under the provisions of the United States Internal Revenue Code, Section 501(c)(7), and Maryland Code, Art. 81, Sec. 88(g)(8).
9. During 1968, Dr. and Mrs. Harry C. Press attempted to obtain membership in Wheaton-Haven.
10. At a meeting of the board of directors of Wheaton-Haven held on July 20, 1968, a motion was passed providing that henceforth guests using the association's facilities were to be limited to relatives of Wheaton-Haven members.
11. A reason for the board of directors' adoption of the guest policy on July 20, 1968, was to prevent members from bringing Negroes as guests.
12. Since July 20, 1968, no Negro has been permitted to use Wheaton-Haven's facilities as the guest of a member.
13. Wheaton-Haven has no Negro members.



14. There are Negro families residing within the geographic area from which Wheaton-Haven draws its members.

Submitted by,

---

Raymond W. Russell  
22 West Jefferson Street  
Rockville, Md. 20850

Allison W. Brown, Jr.  
Suite 501, 1424 - 16th St., N.W.  
Washington, D.C. 20036

Attorneys for Plaintiffs

[Certificate of Service]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

ANSWER TO REQUEST FOR ADMISSION

The Defendants, Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, in answer to Request for Admission, say:

1. Admitted.
2. Admitted.



3. We have no knowledge as to what the Montgomery County Council stated on the date mentioned.

4. We have no knowledge as to what Wheaton-Haven's witnesses substantially testified to some twelve years ago.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Denied.

12. Denied. We certainly are not on the pool premises for the entire period during which it is open each day, and for the entire summer, and thus have no knowledge as to the race of every person who has used the pool for almost two years.

13. Admitted.

14. Admitted.

---

Henry J. Noyes  
Attorney for Defendants

[Certificate of Service]

---

1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

---

MURRAY TILLMAN, et al,

Plaintiffs

vs

Civil Action  
No. 21,294

WHEATON-HAVEN RECREATION  
ASSOCIATION, INC., et al,

Defendants

---

Silver Spring, Maryland

Monday, March 23, 1970

Deposition of

ERNEST E. MC INTYRE

a defendant, called for examination by counsel for plaintiffs, pursuant to notice, taken at 9525 Georgia Avenue, beginning at 2:10 o'clock p.m., before Thomas C. Melo, a Notary Public in and for the State of Maryland, when were present on behalf of the respective parties:

2 For the Plaintiffs:

ALLISON W. BROWN, JR., ESQ.

and

RAYMOND W. RUSSELL, ESQ.

by

ALLISON W. BROWN, JR., ESQ.

For the Defendants:

H. THOMAS HOWELL, ESQ.

and

HENRY NOYES, ESQ.

by

H. THOMAS HOWELL, ESQ.

Also present: Samuel A. Chaitovitz, Esq.

and

MURRAY TILLMAN

Deposition of	<u>Examination by Counsel</u>	
	<u>For Plaintiffs</u>	<u>For Defendants</u>
Ernest R. McIntyre	3	36
	43	

### PROCEEDINGS

MR. BROWN: Would you enter as another appearance on this the local Maryland counsel, although he is not here Raymond W. Russell, Esquire, 22 West Jefferson Street, Rockville, 20851.

Mr. Henry Noyes, counsel for the Wheaton-Haven Recreation Association, Inc., and other defendants in this proceeding, was notified of this deposition taking and the various continuances that have been necessary, and he was notified, most recently this morning, of the fact that the deposition would be taken this afternoon. His secretary indicated that she did not think he would be able to be here.

Thereupon

**ERNEST R. MC INTYRE**

a defendant, called for examination by counsel for plaintiffs and, after having been first duly sworn by the Notary Public, was examined and testified as follows:

**EXAMINATION BY COUNSEL FOR PLAINTIFFS****BY MR. BROWN:**

Q. Will you state your name, please? A. Ernest Richard McIntyre.

Q. And your address? A. My residence?

4 Q. Yes. A. 10403 Amherst Avenue, Silver Spring, Maryland.

Q. What is your occupation? A. I am an attorney.

Q. Are you a member of Wheaton-Haven Recreation Association, Incorporated? A. Yes.

MR. BROWN: As we proceed with this we will refer to the Association as Wheaton-Haven so there won't be any misunderstanding.

MR. HOWELL: Agreed.

**BY MR. BROWN:**

Q. How long have you been a member? A. I think since the early part of 1967.

Q. Are you now, or have you in the past, held office in the Association, or been a member of the Board of Directors? A. I am a member of the Board of Directors, and I believe I was elected in the fall, in November of 1967, for a three year term. And I am presently, as of January or December past, Vice President of the Association.

Q. Did you have any office in 1968? A. None, other than as a member of the Board of Directors.

5 (Discussion off the record.)

BY MR. BROWN:

Q. It has been called to my attention you may have misspoken. You became Vice President in — state it again.

A. I am the current Vice President of the Association, having been elected to that post either in January of 1970 or December of 1969. I don't recall when that organization meeting took place.

Q. Are you familiar with the policy of Wheaton-Haven with respect to the membership policy as regards Negroes?

MR. HOWELL: Objection in as far as it is assumed there is such a policy. You may answer it.

MR. BROWN: Well, I can rephrase it.

BY MR. BROWN:

Q. Are you familiar with any practices or policies that Wheaton-Haven has followed with respect to membership for Negroes? A. What are you talking about?

Q. Well, do you know whether Wheaton-Haven has now, or has had in the past, a practice or policy of denying membership to Negroes? A. The policy at present is, I think, the policy of denying admission to Negroes, said  
6 policy having been established by a vote of the general membership in November of 1969. The current policy is that — well, I will answer that question this way — at the November, 1969 meeting the resolution was presented to the general membership to admit members without regard to race, creed, color, et cetera. That resolution was defeated by the general membership in that meeting of November, 1969.

Q. What was the policy in this respect in 1968? A. I believe it was the same policy.

Q. Do you know when that policy had been formulated?  
A. No.

Q. Or established? A. No.

Q. When you speak of the same policy, you mean that in 1968 there was the same policy of denying membership to Negroes? A. Yes.

Q. Now, going back to 1968, since that is the period that we are concerned with here when the discrimination occurred as alleged against the plaintiffs in this suit, was there discussion in 1968, or about the time that these events occurred, concerning the membership policy for Negroes?

7 MR. HOWELL: Would you place this in reference to before the event or after, or what?

MR. BROWN: All right.

BY MR. BROWN:

Q. Maybe we better start with the Presses. Are you acquainted or do you know who Dr. and Mrs. Harry Press are? A. Yes.

Q. Do you know whether they made application for membership in 1968, or sought to obtain membership? A. Yes.

Q. Do you know what action was taken with respect to their effort to obtain membership in 1968? A. Well, I can't answer that specifically. I mean, to the precise answer to the precise question, I can't tell you exactly what that is. I can give you some background on that.

Q. Would you do that? A. Like I say, I am acquainted with Dr. and Mrs. Press, primarily through their son. I knew their son before I knew the two of them because the youngster played on a softball team that I coached. Then I got to know Dr. Press from coming to the ball-games. I understood that he was interested in joining the pool. I made an inquiry to the Board of Directors with  
8 regard to his membership. This was an informal inquiry. It was not at an organized directors' meeting. I was informed, again informally, without any specific action of



the directors, that they were not in favor of such an application.

Q. Can you place this in terms of time? A. It must have been in the spring or early summer of 1968.

Q. All right. A. I so informed Dr. Press that it didn't look particularly favorable with regard to his application, or with respect to his seeking membership. There came a time when Dr. Press informed me that he intended to seek some judicial, or some other remedy. I think he had in mind a complaint to the Human Relations Commission of the County. I discussed it with him at that time. And I told him at that time that I thought that he might be a bit premature for two reasons. No. 1, at that particular time the pool membership was full. And that they were not admitting anybody. And that I felt that a membership policy would be the subject of the general membership meeting which is held in November of 1968. And that under any circumstances he could not be admitted for the swim season of 1968. And that if the policy

9 was changed there might be a more friendly environment to his admission if the policy was in fact changed at the following meeting, and he wouldn't be gaining anything or losing anything timewise due to the fact the membership was full. I think he agreed to so wait. And then at that general membership meeting it was apparently the feeling or the intention of the general membership that it should not be opened to Negroes. And I think a short period of time after that is when he instituted certain action before the Human Relations Commission. Within a few days after the vote was announced of the November meeting.

Q. Does the Association maintain a waiting list of persons wanting membership even though the membership may be full at a given time? A. If the membership is

full at a given time, then they do maintain such a list, I believe. Of course, if the membership is not full, you get an application and you take his money.

Q. At the time you spoke to Dr. Press about this, and you told him that the membership was full, would it not have been possible for him to have gotten on a waiting list? Assuming the membership was full at the time.

A. Now, I was not directly involved with membership.

10 Q. I understand that. A. So I can't answer yes or no to that. I would believe that he would be. I would believe that an applicant would be assigned to some waiting list. But I don't know.

Q. Do you know in what capacity Mr. Brian Carroll represented Wheaton-Haven in 1968? A. I do not believe that he was representing the pool in any capacity at that time.

Q. Was he on the Board of Directors at that time?

A. No.

Q. He wasn't? A. I don't think so.

Q. Do you know whether he was membership chairman at the time? A. I don't believe he was. He is currently on the Board of Directors. He is currently now. When he was elected, I can't tell you. I think it may have been in November of 1968 when he was elected.

Q. Do you know whether he was membership chairman in 1968? A. I do not believe that he was.

Q. In what capacity if any did Mr. Philip Trusso represent Wheaton-Haven in 1968?

11 A. He was the President.

Q. When you learned that the Association was not in favor of Dr. Press' application, or being a member, who told you this? A. I don't think anybody.

MR. HOWELL: Let me clarify this question. Are you referring to the informal inquiry?

MR. BROWN: The informal inquiry.

MR. HOWELL: I want to clarify it.

THE WITNESS: I don't think anybody told me specifically with regard to Dr. Press. Discussions I had were with regard to Negroes generally.

Q. And about how many people on the Board of Directors did you discuss it with? A. Three or four, I guess.

Q. Including Mr. Trusso? A. Now, I just don't recall whether I asked him specifically or not, whether I discussed it with him or not. I discussed it with people who were not on the Board of Directors, too, who may have had some information or background.

Q. Did you discuss it with the membership chairman at that time?

12 A. I don't know who the membership chairman was.

Q. Is it customary to have a membership chairman who is a member of the Board or who may not be a member of the Board, or what is the procedure? A. I am not trying to be evasive, Mr. Brown. I just don't know. It seems to me when we first started the membership was so full there was no need for a membership chairman. In my first exposure to this pool.

Q. Do you know whether Dr. Press made any further efforts in '68, beyond those you have described, to get membership. In other words, other than talking to you about the matter, and other than later on in the year, in the latter part of the year, beginning legal proceedings?

A. I have no personal knowledge that he did. It is my understanding that he did. It is completely hearsay. I have no personal knowledge.

Q. What is the basis for your understanding? A. Dr. Press told me a few things, certain members of the Board have told me a few things.

Q. What members of the Board specifically did you talk to about this and what did they say to you? A. I discussed it first, I believe, with an individual whose name slips my mind who was Treasurer at the time.

13 Q. Is he one of the defendants in the proceedings?

A. No, he isn't. I will tell you who he is, Sager, S-A-G-E-R. And I may have discussed it with his wife. I may have called his home to speak to him, and rather than — he may have been absent, or something, and I spoke with Mrs. Sager in that regard, who has been a member of the pool for a much longer period than I have.

Q. Mr. Sager, or Mrs.? A. Mrs. — well, both of them have been members for a while. Husband and wife. She explained certain policies to me. I may have discussed it with Mr. Trusso, perhaps, I am not real sure, or I may have brought it up when three or four of them were present. The precise number, or the precise individuals, I don't know. I got the feeling — I was sort of taking a pulse of the Board of Directors without making a formal resolution to the Board.

Q. At the time that Mr. Trusso was President, what was Mr. Sager? A. I think he was Treasurer.

Q. Do you know his full name? A. Robert Sager.

14 Q. Was any action taken at any Board of Directors meeting in 1968 with respect to Dr. Press' effort to obtain membership in the pool? A. I don't think so.

Q. Do you have minutes of the Board of Directors meeting in 1968? A. The pool keeps them. I don't have them.

Q. Do they distribute them to members of the Board? A. No.

Q. Would the minutes reflect whether such a discussion had taken place? A. My impression of the minutes are that they are reasonably accurate, written memo of what took place at the meetings.

Q. Do they reflect votes that are taken? A. They don't reflect individual votes, no, unless somebody asks that they be recorded.

Q. By individual votes, they don't reflect how individual directors vote, is that what you mean? A. No.

Q. Do they reflect normally when a vote is taken and by what margin it goes? A. No, it reflects the mover and the seconder, and then the vote. I mean, there are certain votes where I have asked that my vote be recorded.

15 Q. Did any such vote occur in 1968? A. I don't believe so.

Q. Moving forward then from 1968, what further discussions have occurred, on an informal basis where you have been involved, or Board meetings where you have been involved, relating to the membership policy of Wheaton-Haven as it affects Negroes? A. Well, it was the subject of the general membership meeting in 1968. And there was a vote taken at that time which was interpreted as reflecting a policy of the pool not to admit Negroes. I don't know what the precise wording of the resolution was, or what it said. But it was to that effect. Subsequent to that, of course, we got into the complaint filed by Mr. Tillman and Dr. Press with the Human Relations Commission. Then there was a general discussion, I would suppose, among — certainly it was discussed, this complaint. The question of the hearing on these complaints, there was a hearing set, and there was a decision by the Board — nobody seemed to know just how to respond to these hearings, and what have you. I shouldn't say that either. That is not exactly accurate. But there was a general discussion as to what to do with regard to these particular complaints before the Human Relations Commission.

6 There seemed to be a general feeling that if the community swimming pool were in fact places of public accommodation, then that would be the answer to the question. Then the

law applied, and then Negroes should be admitted. I think it was the feeling of the Board of Directors that that question should be judicially determined, maybe raised as a defense to whatever actions the Tillmans and Presses brought in this regard. Then there seemed to be the question of how to get to this question. And I raised the question, or I raised a possible solution at a Board of Directors' meeting that if we could seek a declaratory judgment with regard to precisely whether a community pool was within the four corners of the public accommodations ordinance, that would answer everybody's question. And it was then determined that such an action should be sought. And I think then an attorney was hired to bring such an action. Unfortunately it never got to be determined. I think after that declaratory judgment action was filed, and before it ever came on for a hearing, the court declared the ordinance invalid by reason of the barber shop case. So the question was mute. And that leaves it open, as far as in the minds of the Board of Directors, as to whether a community pool is a place of public accommodation.

- 17 Q. Did the question of the Association's policy as affecting Negroes come up at the November, 1969 membership meeting? A. Yes.

Q. And, again, the effort to amend the policy, or change the policy, was defeated? A. There was a resolution presented for consideration by the general membership which, as I recall, stated that membership should be open to people of all races, colors, creed, and what have you. Now, at that time it was put to a vote and it was defeated. Now, of course, there is no record kept of any voting at that time. But the final tally was available. I don't remember what it was, but it was defeated by about 12, 15 votes, something like that.



Q. Are minutes kept of general membership meetings?

A. Yes.

Q. And who has the minutes of the membership and Board of Directors' meeting? A. The Secretary of the Association.

Q. Who is that at this time? A. Her last name is Abate, A-B-A-T-E. I don't know what her first name is — Helen maybe.

Q. Mrs. Anthony Abate?

18 A. That would be her husband's name. But I am sure that is it, yes.

Q. Coming forward then to more recent months, has there been further consideration of this question by the Board of Directors? A. Yes.

Q. Could you explain? A. At that November meeting, the vote seemed pretty decisive as reflecting the opinion of the general membership. Subsequent to the general membership meeting, we had a decision from the Supreme Court in the Sullivan case which, I would imagine, you are familiar with. I was of the opinion that that had some impact on the situation, and particularly in view of the litigation which had subsequently been filed in the Federal District Court in Baltimore, this case. I brought that to the attention of the meeting — this would be in January.

Q. Of this year? A. Yes. And proposed to the Board of Directors that this decision of the Supreme Court had a definite impact on the litigation in which we were involved. And I made a motion at that time to the Board of Directors that the policy with regard to admission of Negroes be changed. Pretty much the same one that was presented  
19 in November, that membership should be accepted without regard to race or creeds, et cetera. That resolution that I made was subject to amendment, I think, by some member of the Board, who I don't recall right now, to the

effect that it should be passed and submitted to a special meeting of the membership. I accepted that amendment primarily to obtain another vote, and the resolution with its amendment then was presented to the Board of Directors and a written ballot was taken, and it was defeated. But that's the one where I had asked that my vote be recorded.

Q. What was the margin by which it was defeated?

A. Eight to five, I think, although — don't hold me to that.

Q. Do you know how any of the other directors voted, or were they entirely secret? A. They were secret. I would imagine whoever presented the amendment must have voted in favor of it, so that was myself and the other individual, I think it was Sid Plitman, and then there was three others that voted with us. Present at that meeting, in addition to the Directors, were Phil Trusso who did not vote.

Q. Would you let us go through now — Trusso?

20

A. He was present although he is no longer a director. But he is a defendant in this suit. But he was present. And Bennington was present but did not vote.

Q. Who seconded your original motion before it was amended? A. I don't think it was seconded before it was amended. Sid Plitman was involved in it. That's a guess.

Q. But he wasn't a member of the Board? A. Yes, he is. He is a member of the Board.

Q. Oh, Trusso wasn't. I beg your pardon. So your principal source of support was from Plitman? A. I wouldn't say that he was my principal source of support, no. But I am reasonably confident that he voted with me.

Q. After the motion had been amended? A. Yes, because he proposed the amendment, I think.

Q. Going back to 1968, after you became aware of the Press interest in becoming a member, or the Presses interest of becoming members of the Association, could you, as a director, have raised this matter as at a Board meeting?

A. I could have, yes.

Q. How often does the Board meet? A. During the swim season they meet twice a month. Other times they met once a month.

Q. Did you make any — A. Maybe they met more frequently during the swim season. Maybe every other week, I don't remember.

Q. Did you make any effort to raise it at a Board meeting? A. I am sure I did, yes.

Q. Could you explain? A. Well, it got to be to a point where I was regarded as having a one track mind at some of these directors' meetings, and it soon became evident to me that I wasn't getting anywhere at that point and time. So I quit.

Q. Quit what? A. Quit pushing the application. It was after this when I made an independent judgment that we weren't getting anywhere, that I told Dr. Press to hold off until after the general membership meeting, hoping that the vote would change.

Q. Would the minutes of Board meetings in the summer of 1968 reflect any discussions of this issue that were held?

A. They would reflect some of them. I am sure they wouldn't reflect all. A lot of these discussions were off the record. Maybe not at convening directors meetings, but when I would have one or two or three people around.

You see them at the pool and you chat with them a little bit.

Q. Were you present at a meeting in December of 1968 when a change was made in the guest policy of Wheaton-Haven? A. I believe that that was the subject of several

meetings. And I was at one of them, I believe. I am not sure.

Q. Was a vote taken? A. I was present at a meeting of the directors when this was the subject of some discussion.

Q. Was that the meeting when the policy was changed?  
A. What policy are you speaking of?

Q. Were you present at any Board meeting when a vote was taken with respect to the membership policy of Wheaton-Haven in 1968?

MR. HOWELL: In the summer of '68.

BY MR. BROWN:

Q. Summer of '68. A. With regard to the membership policy?

Q. Yes — guest policy, I beg your pardon. A. I honestly don't remember whether I was or whether I was not. I think the minutes would probably show the attendance at such a meeting. I may have been.

23 Q. Does Wheaton-Haven have a practice or policy of refusing to allow members to bring Negroes as guests?

MR. HOWELL: Wait a minute. Do you mean at the present time, or what period of time?

BY MR. BROWN:

Q. Has it at any time, to your knowledge? A. It does now.

Q. I beg your pardon? A. I say it does now. And during the summer of 1968, sometime in that area, time lapse, when the policy was adopted with regard to guests being relatives of the member.

Q. What was the reason for adopting that policy?  
A. I think there was a general reaction to —

MR. HOWELL: Wait a minute. I have to object to this. Are you concerning this question with discussions

involved in the making of a policy? It is not clear when you say what were the reasons. The reasons of the directors or individuals, or what?

MR. BROWN: All right.

BY MR. BROWN:

Q. What change was made in the Wheaton-Haven guest policy in the summer of 1968?

MR. HOWELL: Objection. I don't think we have gone into what the policy was, or whether Mr. McIntyre knew  
24 or was aware of any particular policy with regard to guests.

BY MR. BROWN:

Q. Throughout 1968 you were a director? A. Right.

Q. Will you describe or relate the nature of the guest policy and any changes that took place in it in the year 1968? A. My understanding was that it was forbidden to bring a guest who lives within the geographical — certain geographical limits surrounding the pool. Anybody that lived within that geographical area could not be admitted to the pool unless, of course, he was a member. No guests from within that area. Other than that, and other than a fee that you paid for the guest, I think that was the only limitation on guests.

Q. Then how was that changed in 1968? A. It was changed to limit guests to relatives of the member involved.

Q. Was this change adopted at a meeting of the Board of Directors? A. I believe it was.

Q. When? A. Sometime in the swim season of 1968. I don't remember when.

25 Q. What was the nature of the discussion at the Board of Directors meeting when this policy was adopted? A. I think it was a discussion of large numbers of guests being brought to the pool.

Q. Would you explain that, please? A. It is difficult for me, Mr. Brown, to recite the nature of the discussion, or the author of such discussion, without — well, with any degree of accuracy. Other than being very general as far as that is concerned.

Q. Please be general. What were the things that precipitated this Board action? What was the nature of the discussion that preceded it? A. I think the nature of the discussion was that Mr. Tillman had a week or so before brought a Negro guest to the pool. And these are the facts about which I have no knowledge. I wasn't there when this thing occurred, and —

Q. When what thing occurred? A. When Mr. Tillman brought Mrs. Rosner to the pool, if that is in fact who he brought. I don't know.

Q. Were you at the Board meeting when this matter took place? A. I was at a Board meeting when this matter — and I am sure this was the subject of some discussion  
 26 at more than one Board meeting. And I remember my primary concern at one point and time was what instruction should the Board of Directors give to the gate attendants who were youngsters and not, in my opinion — to whom it would not be fair to ask them to admit or not admit certain people in their discretion, or what have you. And I was in favor of giving them specific instructions from the Board of Directors so these kids could know pretty much what they were doing. I proposed a resolution that the gate attendants be instructed to admit anybody's guest without regard to whether they were black or white. That resolution failed for want of a second. I then made a motion that the gate attendant should be instructed to bar all Negro guests, and that motion failed for want of a second. At which point I threw up my hands and went for a swim, I think.



Q. Do you recall who made the motion to adopt the present policy, that is, to limit guests to relatives of members? A. No, I don't.

Q. Do you recall the reasons given by the proponents of the motion? A. The announced reasons were to forestall the arrival of large numbers of guests, en masse.

27 Q. Just any kind of guest, or Negro guests in particular? A. I think the discussions were at that point to forestall large numbers of any kind of guests.

But to be truthful with you my recollection is not too strong on this Mr. Brown. Now, I am not trying to evade your question. I honestly don't remember the discussions.

Q. Was this new guest policy brought before the membership at the membership meeting in the fall of '68?

A. Yes.

Q. And what happened at that time? A. This policy was approved at the general membership meeting. The policy of limiting guests to relatives of the members was approved by the membership. And I think it is safe to say this policy was then interpreted as meaning that no Negro guests or members should be admitted, although the language of the precise resolution did not refer to it.

Q. You are speaking of the new guest policy? A. Yes.

Q. Do you know whether since the current guest policy was adopted guests had been admitted who are not relatives of members?

8 A. To my knowledge, they have not. Although I don't pay very close attention to that sort of thing.

Q. So, are you saying they have not, are you saying you have not, or you don't know whether they have, or have not? A. I know of no guest who has been admitted who has not been a relative of a member. I have taken relatives over to the pool as a member, and I have refrained from taking non-relatives.

Q. Have you ever had occasion to check up on whether people are bringing non-relatives as guests? A. No.

Q. So you are really not familiar with the practice, other than what you do? A. That is right.

Q. You said that at the meeting at which this guest policy was adopted, you made two motions which are really diametrically opposite; the first was to admit Negroes, the other was to bar Negroes. A. They were in the form of instructions to be given to the gate attendants.

Q. When this matter was put to a vote, do you recall how you voted on it?

29 A. I don't think I even voted. I am not sure. It was a voice vote. And everybody seemed to be in favor of it. My voice in the wilderness would not be heard. I might add that I don't believe that the guest provision was at the same meeting as my resolution involving the instructions to the gate attendant. I think they were two separate meetings.

Q. But you were present at the meeting when the vote was taken on this present guest policy? A. I believe I was, yes.

Q. Are you familiar with the names and addresses of the — would you have a list of the names and addresses of the directors and officers for 1968, '69 and '70?

A. I am familiar with them. I wouldn't venture to give them to you right offhand. That information is obtainable. I think you listed most of them as defendants.

Q. Well, most of them isn't enough. A. No, there are some that were missed, as a matter of fact.

MR. HOWELL: Off the record.

(Discussion off the record.)

MR. BROWN: Back on the record.

BY MR. BROWN:

30 Q. Mr. McIntyre, shifting now from the question of guest policy, membership policies, back to another matter involving Wheaton-Haven, do you know who the contractor was that constructed the Wheaton-Haven swimming pool? A. No.

Q. Does the Association have a maintenance contract with a firm to do annual work on opening it, and so forth? A. No.

Q. Who does the maintenance and upkeep? A. Well, it is usually done by certain individuals within the pool, Bernie Katz, for one. The actual physical —

Q. Excuse me, Bernie Katz does what? I don't understand what you said. A. He is currently the President, and he sort of supervises the cleaning and maintenance of the pool. Now, it is done — if certain of the equipment needs replacing and repair, and what have you, he will contract for its repair. But this is not on a continuing basis. I think if a part needs repairing and he knows somebody that makes parts, he calls them up and the man comes out and repairs or replaces it. But nobody does it as a matter of contract basis.

Q. I have never seen the Wheaton-Haven facility. What are its characteristics? Would you describe it? A. It is a 25 meter pool in the shape of a Z with a diving area at one end of the Z, and sort of a kiddies pool at the other end. There is a bathhouse there.

Q. Constructed of what? A. Oh, I think it is cinder block and wood. And then the usual filtration system.

Q. Is that housed in a part of the bathhouse, or is it a separate structure? A. No, it is a separate structure. It is sort of underneath the ground. You go down to a cinder block basement type area where the filter system is.

Q. Is the pool enclosed, or the property enclosed by a fence of some sort? A. Yes.

Q. What type — A. Anchor fence about six feet high, I am sure.

Q. Have you ever noticed on any of the equipment, or the anchor fencing, or the pumps, filters, that sort of thing, any labels indicating the manufacturer? A. No, sir, I haven't.

Q. Have you ever noticed any labels or signs indicating the source of materials used around the pool and owned by Wheaton-Haven Association?

MR. HOWELL: What is the relevancy of signs and labels?

32 MR. BROWN: To show interstate commerce because part of our basis for our complaint is based upon the 1964 Civil Rights Act, which requires a showing of some movement in interstate commerce.

MR. HOWELL: I think it is rather remote or speculative that this witness would know or have reason to know as to the interstate commerce aspects of the material. Now, I will permit him to answer. But I do interpose the objection.

MR. BROWN: I am only asking him if he knows. He obviously can't testify to anything he doesn't know.

MR. HOWELL: If he knows, he can answer.

THE WITNESS: They use chlorine gas, but I don't know where they get it. And they use some sort of a compound in the filter system, but I don't know where they obtain that either.

BY MR. BROWN:

Q. Is there any equipment that's used around the pool, such as beach chairs, or picnic tables, that sort of thing, that belong to the Association? A. Tables and chairs, yes.

33 Q. What is the nature of their construction, what materials are they constructed from? A. Aluminum and some sort of a plastic webbing.

Q. That is the chairs. What about the tables? A. I guess they are aluminum. I don't know.

Q. Is any merchandise sold on the pool premises, either through a snack bar or machines? A. There is candy and ice cream.

Q. Sold how? A. Some times they are vending machines there. They don't operate too efficiently. Other times they are kept in a freezer inside and dispensed by the gate attendant.

And this is on an annual basis, I think. They contract with some individual each season to supply them with candy and ice cream.

Q. And then the gate attendant sells it? A. We have done it both ways. One season the gate attendant would sell it, and the other season they had a vending type machine outside, coin operated machine.

Q. Outside where? A. In the bathhouse area, but it is outside the building. Under an overhang, or something.

Q. Would the sale of these foodstuffs result in a profit to anybody?

A. I believe the pool realizes some profit on it.

Q. Is anything besides candy and ice cream sold on the pool premises? A. Soft drinks, I think.

Q. Such as? A. I think we had a Coke machine there, whatever happened to be bottled by the Coca-Cola people, Sprite, or whatever it is.

Q. Are cigarettes sold? A. I don't think so.

Q. Is there any sale of anything like bathing caps, or sweat shirts? A. No, none of that stuff.

Q. Would you describe how these machines are located, are they set up in a bank, these vending machines? A. As

I recall, there is never more than two, a Coke machine and a candy machine, and maybe an ice cream machine. I just don't remember. But the kids go up and put a dime in it and open the machine and take out what they want. They are in a line-up there outside of the building.

Q. Who is in charge of hiring lifeguards and pool managers, and this kind of thing? A. Well, they have an Operations Committee which changes from year to year, and that committee has that job.

Q. Does the Association hire a contractor who does that on a fee basis? A. No, we hire them ourself.

Q. Do you have any idea of the annual budget of the Association such as the amount of income from dues and other sources? A. Well, they compute the dues to sort of meet the operations expenses. It costs about \$15,000 a season to run that pool. And that charge is divided up among the members.

Q. \$15,000? A. That is a ballpark guess.

Q. Is the membership limit stated in the bylaws of 325 family units strictly observed? A. Some times we don't have 325.

Q. Do you ever go over 325? A. I don't think so. I think that's imposed by the special exception that they have from the County.

Q. Since 1968, up to the present time, has the membership been below the 325 level, to your knowledge? A. We are below it now. And I am not sure when precisely we fell below it. But it is below the number now.

36 MR. BROWN: That is all I have, Mr. McIntyre.

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MR. HOWELL:

Q. With respect to the vending machines, and the sale of candy or soft drinks, or refreshments, are these vending



machines enclosed within the pool area, or otherwise are they accessible to the public? A. No, they would not be. They are within a few feet of the water, really. On the deck up by the bathhouse.

Q. The sale of these items would be limited to members and their guests? A. Yes, you would have to be in the pool itself in order to be able to obtain them.

Q. Now, you mentioned the word profit in connection with these. Is this a profit to the Association, or is it a means of defraying expenses, or could you — A. It is a means of defraying expenses. By that I mean — I believe in the past it has been on a basis whereby we get some commission for having the machines located on the premises. And it goes through the Association to defray whatever expenses the Association has.

Q. But the Association is a non-profit organization, isn't it?

37 A. That is correct.

Q. You said that you have been a member of the Board of Directors since 1967, is that correct? A. I think I was elected to the Board of Directors in November of 1967.

Q. November of 1967? During your membership to the Board of Directors, did the question of racial or religious considerations arise with respect to membership or guests policy, while you were a member of the Board? When was the first time that it arose while you were a member of the Board, if ever? A. I think the first time it ever came up was when I inquired about it myself with regard to the Presses.

Q. Now, this —

MR. BROWN: Off the record.

(Discussion off the record.)

## BY MR. HOWELL:

Q. Now, were these inquiries undertaken at the request of Dr. or Mrs. Press? A. Well, I will put it this way — I understood they were interested in joining the pool, and as a member of the Board of Directors I spoke to the Presses about it, and then I presented it to the Board.

38 Q. When you spoke to the Presses they expressed interest in becoming members of the pool? A. Yes.

Q. And you ascertained they had the requisite qualifications under the bylaws of the Association? A. Right.

Q. In making these inquiries, this was to ascertain the reaction of members of the Board were a vote to be taken, a formal vote? A. That is correct.

Q. And what was your conclusion after making these inquiries? A. My conclusions were that they would not be admitted as members.

Q. In other words, had you proposed a resolution at that time what would your conclusions have been? A. My conclusions would have been that it would have been unsuccessful. My conclusion was that it was unsuccessful.

Q. During your membership on the Board of Directors, have you proposed that the Board or the Association adopt a policy to exclude members or potential members on the basis of race or religion, or national origin, color, or similar circumstances?

39 A. My proposals have always been to the opposite effect.

Q. Have you ever voted in favor of a proposal which would exclude persons on the basis of their race or color? A. No.

Q. Have you, as a member of the Board of Directors, ever proposed a policy limiting guests or members to members of the white or Caucasian race? A. No.

Q. Have you ever proposed or voted in favor of a policy which would exclude Negroes or persons on the basis of race or color? A. No. My votes in that fashion have always been to the other side of the coin.

Q. With respect to the requests, formal or informal by or on behalf of Dr. and Mrs. Press, have you at any time sought unfavorable action with regard to their request for membership. A. Would you repeat that? I am not quite sure I understand.

Q. Let me put it in simple terms. Have you ever proposed or voted that the Association turn down Dr. and Mrs. Press on the basis of their race or color?

40 A. Oh, no, no.

Q. Have you voted to reject them as members for any reasons? A. No.

Q. Have you taken a contrary position with respect to them? A. Yes.

Q. What is that position, sir? A. That they ought to be members of the pool.

Q. Now, with regard to Mrs. Rosner — it is Mrs., is that correct?

MR. BROWN: Yes.

BY MR. HOWELL:

Q. Have you ever met Mrs. Rosner? A. No.

Q. Have you ever proposed or voted against her becoming a guest of the Association, or have you acted in any way to deny her the use of the pool as a guest of a bonafide member? A. I don't believe I have.

Q. As a member of the Association, have you ever cast a vote one way or the other with respect to the admission or exclusion of guests or members on the basis of their racial —

41 A. Yes.

Q. Did you cast such a vote in the 1968 meeting in November of 1968? A. I think I did.

Q. Can you recall the general nature of the vote and what your vote was? A. At that point and time the vote was as to whether or not the policy to admit guests only relatives of members, was taken, and I voted against that policy. This was at a general membership meeting in which I voted as a member, and I think I spoke as a member, although I was seated in an area where the Board of Directors were.

Q. Now, also speaking with respect to your membership of your Association, have you taken a position or cast a vote at a general membership meeting in 1969, November of 1969? A. Yes.

42 Q. What was the subject, and how did you vote at that meeting? A. My vote was on a particular resolution presented by one of the members which, as I recall stated that membership should be open without regard to race, creed, color, et cetera. Litigation was — this present litigation was pending at that time. And I spoke to this resolution. And I asked Mr. Tillman several questions, which he answered from the floor. Thereupon, I spoke in favor of the resolution and cast my vote for the motion.

Q. This is the November of 1969 meeting? A. Yes.

Q. While you were a member of the Board of Directors, but prior to the inquiries made on behalf of Dr. and Mrs. Press, did the subject of race or color come up at any of the meetings of the Board of Directors? A. Never — well, that wasn't a particularly long period of time. I was elected as a director in November of 1967, and then I must have inquired say around April or May of 1968. But in that intermediate period there was no discussion of any nature without regard to membership regarding race.

Q. When you discussed the pattern or practice without regard to race or color, you are referring to the position of the Association with respect to the plaintiffs in this suit Dr. and Mrs. Press and Mrs. Rosner? A. I am not sure I understand the question.

MR. HOWELL: I will rephrase the question.

BY MR. HOWELL:

Q. When you stated that there was a pattern or practice of the Association, was this a pattern or practice which had arisen prior to Dr. and Mrs. Press seeking membership in the pool? A. I would assume so, yes.

Q. That is an assumption on your part? A. Yes.

Q. Did you take any part in adopting on behalf of the Association, or on behalf of the Board such a policy or practice? A. Well, I think the first meeting, general membership meeting I ever attended, was in November of 1967 when I was elected a director. And I have been to no meetings prior to that time.

MR. HOWELL: I have no further questions.

#### FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. BROWN:

Q. Mr. McIntyre, in the spring of 1968, when you became aware of the Presses interest in becoming members, Dr. Press' interest in becoming a member, you said that you spoke to a few people to get a sounding. Now, you have mentioned I think, if I am not mistaken, two people in particular that you spoke to. Correct me if I am wrong, I am trying to recall now. I think you said you spoke to Mr. Trusso and Mr. Sager. A. I am not real sure whether I spoke to Phil Trusso or not. I remember discussing it with Beverly Sager, who is the wife of Robert Sager, who was a member of the Board.

Q. You spoke to Mrs. Sager? Do you recall anyone else on the Board you discussed it with? A. I am sure I discussed it with three or four, but I don't remember just who or in what order.

Q. Three or four members of the Board, or just members of the Association. A. Members of the Board.

Q. Not including Mr. Sager, who was not a member of the Board? A. That is correct. Mr. Lane, — I don't remember discussing it with Mr. Lane, but I am sure it was at a discussion where he was present.

Q. How many members of the Board of Directors were there at that time? A. Fifteen.

Q. Do you know, since the summer of 1968, have new members been admitted to the Association?

45 A. Yes.

Q. Do you know of anybody that has been denied membership? A. No.

Q. Do you know of anybody that has ever been denied membership in the Association aside from the Presses? A. No.

Q. Do you know whether anyone has been denied membership who might have lived outside the geographical area, that is the three-quarter geographical limit? A. No — well, I don't know if anybody, really, has applied that lives outside the limit. To my knowledge, nobody has been denied membership that came to my attention.

Q. I see. Is it a fact then that, to your knowledge, there are no members who reside outside the three-quarter mile membership radius? A. No, I am sure some who do reside outside that area. We are permitted I think 30 percent of the total membership can live outside of that area.

Q. Well, is the general pattern for the pool to be below maximum membership so that people as they apply



are accepted, or is it general pattern that there is a waiting list?

46 A. I don't think there is a general pattern. When I first joined the pool, I made inquiry in the winter, and usually —

Q. Winter of what? A. It would be the winter of 1966 — '67. And if people are going to resign from the pool they usually do it in the fall after the swim season is over. So that's when you get your turn over. And I don't recall — I believe we had to wait until a certain number of resignations were processed, and then we were able to join. But the pattern has been that it was full that year. And I think then it has started to decline. So that there is — I don't know precisely how many members we have at this time, but I know it is less than 325.

Q. Are membership applications discussed at Board meetings? A. Yes.

Q. And they are approved at Board meetings?

A. That is correct.

MR. BROWN: That is all, Mr. McIntyre.

MR. HOWELL: No questions.

I have read the foregoing  
pages 3 to 46, inclusive, which  
contain a correct transcript of  
the answers made by me to  
the questions therein recorded.

---

[Certificate of Notary Public]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MOTION TO STRIKE

The Defendants, Wheaton-Haven Recreation Association, Inc., Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, by their attorney, Henry J. Noyes, move this Honorable Court to strike from the Complaint in this case immaterial matter, as follows:

1. That paragraph V (C) of the said Complaint refers to a copy of the Opinion, including findings of fact, conclusion of law, panel decree and final Order, rendered on May 29, 1969, by the Montgomery County Commission on Human Relations, Panel on Public Accommodations.

2. That such fourteen page Opinion, findings of fact, conclusion of law, panel decree and final Order, is in fact attached to the said Complaint.

3. That the said Montgomery County Commission on Human Relations, Panel on Public Accommodations, and Public Accommodations Ordinance, known as Ordinance No. 4-120, enacted January 16, 1962, has been declared to be void and unenforceable by the Circuit Court for Montgomery County, Maryland, as is indicated by Opinion of the Honorable Irving A. Levine attached hereto and prayed to be made a part hereof.

4. That aside from the Opinion of the Honorable Irving A. Levine, the duties of the said Montgomery

County Commission on Human Relations, as set forth in Section 77-5 of the Montgomery County Code, (1965 edition as amended) in no way authorized the said Commission on Human Relations to make conclusions of law or enter Decrees and final Orders.

5. That any reference to ex parte proceedings before the Montgomery County Commission on Human Relations is immaterial and irrelevant to this case.

WHEREFORE, the Defendant pray:

1. That the Complaint be stricken.

---

Henry J. Noyes  
Attorney for Defendants

[Certificate of Service]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

**OPPOSITION TO MOTION FOR JUDGMENT ON  
THE PLEADINGS, SUMMARY JUDGMENT,  
AND INJUNCTION**

---

The Defendants, ~~Wheaton-Haven~~ Recreation Association, Inc., Bernard Katz, Philip S. Truso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and

James M. Whittles, by their attorney, Henry J. Noyes, oppose Motion for Judgment on the Pleadings, Motion for Summary Judgment, and Motion for Preliminary Injunction, and for reasons state:

1. That following the filing of the original Complaint herein, the said Defendants timely filed a Motion to Strike, praying this Honorable Court to strike the entire complaint, for reasons more particularly set forth therein.

2. That no hearing has yet been set on the Motion to Strike.

3. That although the Plaintiffs allege that this Honorable Court granted leave to amend Complaint on March 12, 1970, and further allege that the Complaint was in fact amended, the Defendants have been served with no copy of such amended Complaint.

4. That a Motion to Dismiss, filed by the above named Defendants, is pending before this Honorable Court.

5. That the voluminous pleadings in this cause indicate substantial issues of material fact which preclude the Plaintiffs from obtaining Summary Judgment as a matter of law.

6. That the Plaintiffs, in praying for a preliminary injunction, baldly represent unto this Honorable Court that they will be irreparably injury unless such injunction is granted, without supporting facts.

7. That to the contrary, Montgomery County, Maryland has a substantial number of swimming pools, both public and private, which will amply serve the needs of the Plaintiffs, for the summer months, without inconvenience or injury in any respect, irreparable or otherwise.

WHEREFORE, the Defendants pray:

1. That the said motions be denied.

\* \* \* \* \*

---

Henry J. Noyes  
Attorney for Defendants

[Certificate of Service]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS

---

The Plaintiffs herein apparently rely heavily on the recent case of *Sullivan vs. Little Hunting Park, Inc.*, 396 U.S. 229, in that their statement of the case calls the *Sullivan* case "indistinguishable" from the case at bar. To the contrary, the cases are vastly different, as to facts, that the provisions of 42 U.S.C. Section 1981 and 1982 are inapplicable.

In the *Sullivan* case, a pool member had an absolute right to transfer or assign his membership, without approval of the Board of Directors. *Sullivan*, a white man, in leasing his home to Freeman, a Negro, for One Hundred Twenty-Nine Dollars (\$129.00) per month, attempted to assign his membership. The Board of Directors refused to allow the assignment, and expelled *Sullivan* from the Club. The

Supreme Court found that part of the One Hundred Twenty-Nine Dollars (\$129.00) monthly rental was for the assignment of the membership share in Little Hunting Park. It then found 42 U.S.C. Section 1982 applicable, as follows:

**"All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."**

The Sullivan case is therefore closely tied in with the right to purchase or lease property, and the denial of such right. In the Wheaton-Haven case, the Plaintiffs, Press, purchased their home on June 21, 1967. There is no indication that they purchased such home with any representation that they would be afforded a membership in Wheaton-Haven, nor does it appear that any portion of their purchase price included an assignment or transfer of such membership. Indeed, the land records of Montgomery County, Maryland indicate that the purchase price was Thirty-Three Thousand Five Hundred Dollars (\$33,500.00) and that they obtained a no down payment VA loan of Thirty-Three Thousand Five Hundred Dollars (\$33,500.00).

As to the Plaintiff, Rosner, she sues on the basis that she is being denied the right to make and enforce contracts and has been denied the "right to use and enjoy facilities of public accommodation". No cases have come to the attention of the writer wherein vague theories have been asserted, much less upheld by the Courts. The contractual relationship, allegedly violated, is not set forth in the Complaint against Wheaton-Haven. Further, the Supreme Court has not yet gone so far as to state that a community



swimming pool is a "public accomodation", and did not so state in the Sullivan case.

The Defendants refer Your Honors to the dissent in the Sullivan case, which characterized the Supreme Court decision as "undiscriminating". The Defendant suggests that the case before Your Honors bears out the language of the dissent in the Sullivan case which referred to the "inevitable difficulties which the Court will encounter if it continues to employ Section 1982 as a means for dealing with the many subtle human problems that are bound to arise as the goal of eliminating discriminatory practices in our national life is pursued".

---

Henry J. Noyes  
Attorney for Defendants

[Certificate of Service]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MEMORANDUM OF DEFENDANTS IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

---

1. The Plaintiffs herein by their original complaint, and subsequent motions, apparently rely heavily upon 42 U.S.C. Sections 1981 and 1982, as cited and interpreted in a recent Supreme Court case of *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229.

2. That the Plaintiffs, Harry C. Press and Francella Press, make no allegation in any of the pleadings that they were in any way deprived of any interest in the real estate which they purchased in June of 1967. Specifically, they made no allegation and make no allegation that they purchased the home, from its prior owner, with any representation by any present member, former member, or any of the Defendants, that they would be afforded or granted any privilege of membership in the Defendant corporation.

3. The Plaintiffs, Murray Tillman and Rosalind N. Tillman make no allegation that they have in any way been deprived of any of their rights to use the pool, as was the situation in the Sullivan case, and make no allegation that their right to bring guests is any different than all other members of the pool corporation.

4. The Plaintiff, Grace Rosner, makes no allegations of any fact, whatsoever, which would entitle her to recover under any Federal or State statute, local ordinance, or common law.

5. That although the Motion for judgment on the pleadings, or summary judgment, filed by the Plaintiffs, indicates that this Honorable Court granted leave to amend complaint on March 12, 1970, no amended complaint has been served upon the Defendants, or filed with the Court.

Respectfully submitted,

---

Henry J. Noyes  
Attorney for Defendants

[Certificate of Service]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

**MOTION OF E. RICHARD McINTYRE  
FOR SUMMARY JUDGMENT**

---

E. Richard McIntyre, one of the Defendants herein, by John H. Mudd and H. Thomas Howell, his attorneys, moves the Court to enter summary judgment for the said Defendant on the entire action on the ground that there is no genuine issue of material fact and the Defendant is entitled to judgment as a matter of law. In support of said Motion, the Defendant refers the Court to the deposition of the said Defendant on file in these proceedings.

/s/ John H. Mudd

---

John H. Mudd

/s/ H. Thomas Howell

---

H. Thomas Howell

10 Light Street (17th floor)

Baltimore, Maryland 21202

LE 9-5040

Attorneys for E. Richard  
McIntyre, Defendant

[Certificate of Service]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MEMORANDUM IN SUPPORT OF MOTION  
OF E. RICHARD McINTYRE, DEFENDANT,  
FOR SUMMARY JUDGMENT

E. Richard McIntyre, one of the Defendants herein, by his undersigned attorneys, respectfully submits the following points and authorities in support of his Motion for Summary Judgment.

The Defendant, E. Richard McIntyre, is joined to this action solely by reason of the allegation that he was an officer and/or director of the corporate defendant (Wheaton-Haven Recreation Association, Inc.) at the time of the events complained of. While the Plaintiffs complain of the collective acts of the officers and directors as a group, Defendant McIntyre is not otherwise mentioned in the Complaint and no wrongful act is attributed to him personally. This omission is sufficient of itself to require dismissal of the action as to Defendant McIntyre under the rule that officers and/or directors are not liable for corporate wrongs unless it affirmatively appears that the individual "specifically directed or actively participated or cooperated in a particular act of commission or omission \* \* \*." *Fletcher v. Havre de Grace Fireworks Company*, 229 Md. 196, 177 A.2d 908, 910 (1966). See also 3 *Fletcher Cyclopedia Corporations* §1137 (1965 ed.), and cases cited therein; *Deutsch v. Aaron & Little Straus Foundation*, 155 F.Supp. 551, 552 (D.Md. 1959). Merely identifying Defendant McIntyre as one of the officers and/or directors of the Defendant corporation is manifestly insufficient to state a claim for relief against him individually.

From the deposition of the Defendant McIntyre, on file in these proceedings, it affirmatively appears that he did not direct or actively cooperate in any alleged unlawful discrimination. The deposition clearly indicates that he disassociated himself from racial policies but was consistently outvoted and overruled by a majority of the board of directors with respect to the Plaintiffs' eligibility for pool membership and/or guest privileges (see Dep. pp. 21, 25-26, 29, 37-43). For Defendant McIntyre to be exposed to litigation or subjected to liability is simply to discourage individual efforts at persuasion, conciliation, and internal reform.

What is said with respect to damage is equally true as to the Plaintiffs' claim for injunctive relief.

"\* \* \* [T]he officers, agents and stockholders of a corporation are not necessary parties defendant in either an action at law or a suit in equity against the corporation unless, generally, they have a distinct individual and indivisible interest or a distinct several liability as participants in the wrongdoing or breach of contract complained of; and it is ordinarily improper to join them as such parties defendant merely because of their relation to the corporation. And this rule undoubtedly obtains in the case of a suit for an injunctive as well as in the case of any other suit in equity." *Fletcher Cyclopaedia Corporations* §4873 (1970 rev.), and cases therein.

And see *S.E.C. v. Union Corp. of America*, 205 F.Supp. 518, 521-522 (E.D.Mo.), affirmed 309 F.2d 93 (8th Cir.

1962) (injunction against corporation not extended to officers and directors not shown to have acted in bad faith).

---

John H. Mudd

---

H. Thomas Howell  
 10 Light Street (17th floor)  
 Baltimore, Maryland 21202  
 LE 9-5040  
 Attorneys for E. Richard  
 McIntyre, Defendant

[Certificate of Service]

---

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S  
 MOTION FOR SUMMARY JUDGMENT AGAINST  
 DEFENDANT MCINTYRE AND/OR PRELIMINARY  
 INJUNCTION

---

E. Richard McIntyre, one of the Defendants herein, by John H. Mudd and H. Thomas Howell, his attorneys, respectfully submits the following Memorandum in opposition to the Plaintiffs' Motion for Summary Judgment Against Defendant McIntyre, or in the Alternative, Motion for Summary Judgment Against All Defendants.



The action was commenced on or about October 13, 1969 seeking injunctive relief and damages and joining as Defendants the Wheaton-Haven Recreation Association, Inc. and thirteen of its directors, including the Defendant, Richard E. McIntyre. On December 5, 1969, Defendant McIntyre filed a timely Motion Pursuant to Rule 12, Federal Rules of Civil Procedure and requested an oral hearing thereon. Despite the lapse of six months, the Motion is still pending without any determination whether or not the Complaint states a claim for relief against Defendant McIntyre. Issue has not been joined. Prior to filing combined motions against all Defendants late in April, 1970, no attempt was made to schedule a hearing on the Motion of Defendant McIntyre. Quite the contrary, the Plaintiffs have twice sought and obtained successive extensions of time of ninety and thirty days in which to reply to said Motion.

Having moved at somewhat less than breathless speed, and perhaps sensing the approach of hot weather, Plaintiffs now demand a preliminary injunction to restrain all Defendants from denying to them membership and/or guest privileges to the community pool. In addition, Plaintiffs move for summary judgment against Defendant McIntyre (and for judgment on the pleadings against the remaining Defendants) without a prior opportunity to be heard on the Motion to dismiss and/or strike and before the joining of issue in this case.

On behalf of Defendant McIntyre, it is submitted that Plaintiffs are not entitled to summary judgment, preliminary injunction or any other relief sought and their motions must be denied for the following reasons.

1. The motion was premature in that motions to dismiss the Complaint are pending and have not yet been heard.

2. The Complaint fails to state a claim against the Defendant McIntyre upon which relief can be granted, as indicated in the Motion for Relief Pursuant to Rule 12, and the memorandum filed in support thereof.

3. Defendant McIntyre is improperly joined as a party to this action and must be dropped therefrom.

4. Neither the Complaint nor the Plaintiffs' motion disclose any basis for the relief sought by Plaintiff Tillman or Rosner.

5. It conclusively appears from the deposition of Defendant McIntyre, on file in these proceedings, that he did not engage in any unlawful act or policy complained of and that he is entitled to judgment as a matter of law. In the alternative, the said deposition shows the existence of genuine basis of fact precluding summary judgment for the Plaintiffs.

6. Neither the Complaint nor the Plaintiffs' motion disclose any basis for issuance of a preliminary injunction or other equitable relief, there being no showing of irreparable harm and it appearing that Plaintiffs are guilty of laches.

Respectfully submitted,

/s/ John H. Mudd  
John H. Mudd

/s/ H. Thomas Howell

H. Thomas Howell  
10 Light Street (17th floor)  
Baltimore, Maryland 21202  
LE 9-5040

Attorneys for E. Richard  
McIntyre, Defendant

[Certificate of Service]

IN THE CIRCUIT COURT FOR  
MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY :  
MARYLAND :

Plaintiff :

vs. :

NO. 36124 EQUITY

HERMAN ELLIOTT :

Defendant :

OPINION AND ORDER

Montgomery County, the Plaintiff herein, prays for a mandatory injunction compelling the Defendant, a barber shop operator, to comply with the County Public Accommodation Ordinance, *Ordinance 4-120*, now a part of *Chapter 77, Montgomery County Code, 1965*.<sup>1</sup> The

<sup>1</sup> "Article II. Discrimination in Places of Public Accommodation. Sec. 77-8. Statement of policy.

It is hereby declared to be the public policy of the county that discrimination in places of public accommodation against any person on account of race, color, religion, ancestry or national origin is contrary to the morals, ethics and purposes of a free, democratic society; is injurious to and threatens the peace and good government of this county; is injurious to and threatens the health, safety and welfare of persons within this county; and is illegal and should be abolished. It is further declared that this article is intended to apply and shall apply to all places of public accommodation in this county, whether or not such places are listed in section 77-9 of this Code, except as otherwise expressly provided. \* \* \*

Sec. 77-9. Applicability of article.

This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall

(continued)

County claims that the Defendant violates the Ordinance by refusing to serve patrons on account of their race.

In accordance with the provisions of the Ordinance, the County's Human Relations Commission Panel on Public Accommodations has previously held a hearing and found that the Defendant committed unlawful discriminatory practices in the operation of his barber shop. It is alleged here that the Defendant has refused to comply with the Panel's order that he cease and desist from engaging in his discriminatory practices.

The Defendant demurs to the Bill of Complaint upon several grounds. In the view which the Court is obliged to take of this case, it shall be necessary to consider but one of those grounds. The Defendant contends that the Ordinance is void *ab initio* in that it is distinctly legislative in nature under the test enunciated by the Court of Appeals in *Scull vs. Montgomery Citizens League*, 249 Md. 271, 239 A.2d 92 (1968), but was enacted in executive rather than legislative session.

<sup>1</sup> (continued) apply and be applicable to every place of public accommodation, \* \* \* whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public, either with or without charge, and shall include, but not be limited to, the following types of places, among others: \* \* \* service establishments; \* \* \*.

Sec. 77-10. Prohibited acts.

It shall be unlawful for any owner, lessee, operator, manager, agent or employee of any place of public accommodation, resort or amusement within the county;

(a) To make any distinction with respect to any person based on race, color, religion, ancestry or national origin in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

\* \* \* \* \*

The thrust of the County's argument in opposition to the demurrer is that, under the *Scull* test, the Ordinance was not legislation since it merely codified the common law innkeepers rule, and did not promulgate a "new plan or policy". Thus, the County contends, the subject matter of the Ordinance was amenable to executive action in an effort to "implement or administer" the otherwise prevailing common law rule.

In *Scull*, the Court of Appeals addressed itself to the problem created by the dual nature of the Montgomery County Council, which constitutes both the executive and legislative branches of the county government. Interpreting the Montgomery County Charter and the Express Powers Act, the Court distinguished between actions by the County Council which are essentially legislative and those which are essentially executive. Action by the County Council which prescribed a new plan or policy of general application is essentially legislative and may be validly enacted only while sitting in legislative session during the month of May (now from January 5 to February 3 of each year). On the other hand, action by the County Council which "merely looks to or facilitates the administration, execution or implementation of a law already in force and effect" is essentially executive and may be validly promulgated while sitting in executive session. 249 Md. at 282, 239 A2d at 98 (emphasis supplied). The Court concluded that distinctly legislative ordinances adopted by the County Council in executive session are "null and void". *Id.* at 284.

Since the same representative body, the County Council, sits as both the executive and the legislature, there may appear — at least superficially — to be little need to delineate the respective powers of each. Nonetheless, the Maryland "home rule" legislation and the Montgomery



County Charter each contribute significant reasons why such a delineation is essential.

First, *Article XI-A* of the Constitution of Maryland, which is the backbone of "home rule" in this State, specifically requires that a county council may enact legislation only during a time period specified in the county charter, not to exceed forty-five days per year. As the Court noted in *Scull*, "Section 3 of Art. XI-A requires [that there be] a charter provision for 'an elective legislative body in which shall be vested the law-making power' of the County." Moreover, "[t]he Charter must [provide that]: '\* \* \* all legislation shall be enacted at the time so designated for that purpose \* \* \*.'" 249 Md. at 278, 239 A2d at 95-96 (emphasis in original). These constitutional restrictions were part of the political settlement under which "home rule" was first obtained in 1915. As the Court of Appeals stated in *Schneider vs. Lansdale*, 191 Md. 317, 327, 61 A2d 671, 675 (1948) and adopted in *Scull*, 249 Md. at 275, 239 A2d at 94, "[t]hose who framed the amendment were fearful of a lawmaking body in continuous session and therefore the new authority to legislate was carefully restricted."

Second, the Montgomery County Charter complies with these Maryland constitutional requirements and in addition provides for popular referendum. As the Court noted in *Scull*, "Section 3 [of Article II of the Charter] 'General Legislative powers,' reads:

"The county council is the elective legislative body of the county and is vested with the lawmaking power thereof \* \* \*.'" *Scull*, 249 Md. at 278, 239 A2d at 96 (emphasis supplied).



Similarly, as the Court there noted, "Article II, Sec. 1, makes the Council 'in legislative session' the body in which is vested exclusively the law-making power of the County \* \* \*." 249 Md. at 281, 239 A2d at 97 (emphasis supplied). Consequently, although "the executive branch of county government shall be composed of the county council in executive session" (Art. III, §1), Section 3 provides that "[t]he county council shall have power in executive session to: (a) Exercise all powers, *except powers to enact legislation* \* \* \*." Scull, 249 Md. at 278-80, 239 A2d at 97 (emphasis supplied). Additionally, Article II, §6(a) of the Montgomery County Charter specifically provides that:

"The people of Montgomery County reserve to themselves the power by petition to have submitted to the registered voters of the county for approval or rejection by them \* \* \* any public local law \* \* \*."

Since the County Council in legislative session is vested exclusively with the power to enact "public local laws," only ordinances enacted in legislative session are subject to the right to petition for referendum. Consequently, the promulgation of distinctly legislative ordinances while the Council is sitting in executive session not only violates the Maryland constitutional delegation of authority to the County, but also deprives the people of a right to petition for referendum.

In delineating the scope of the Council's powers in executive and legislative session, the Court of Appeals adopted a "recognized test": An ordinance is subject only to legislative enactment, the Court said, if it " \* \* \* is one making a new law an enactment of general application prescribing a new plan or policy \* \* \*." Scull, 249 Md. at 282, 239

A2d at 98. Conversely, an ordinance may be adopted in executive session only if it " \* \* \* is one which merely looks to or facilitates the administration, execution or implementation of a law already in force and effect." *Id.* (emphasis supplied).

The case at bar does not pose any question regarding the substance or constitutionality of Public Accommodations Ordinance 4-120. The primary question presented is the propriety of the mode of enactment of Ordinance 4-120 as evaluated under the test announced in *Scull*. In particular, the issues raised are whether the common law innkeeper rule operates so as to prescribe racial discrimination by barbers and, if it does, whether the *Scull* test is satisfied by the County's "implementation" of a common law rule.

At common law, private businesses were generally allowed to refuse to deal with anyone for any reason. As early as 1460, however, the general rule was altered in the case of an innkeeper, so that "[i]f I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him \* \* \*." *Anonymous*, *Y. B. 39 H. VI* 18.24 (1460) (*Moile, J.*); 3 *Blackstone, Commentaries* 166 (Lewis ed. 1902); *Storey, Commentaries on the Law of Bailments* §475, 590-91 (9th ed. 1878); see generally *Tidswell, The Innkeeper's Legal Guide* (1964). The adoption of the English common law by the American States brought with it the common law innkeeper rule, so that it has been generally recognized that the rule applies in virtually all of the states. E.g., see, *Heart of Atlanta Hotel, Inc. vs. United States*, 379 U.S. 241, 261 (1964); *Civil Rights Cases*, 109 U.S. 3, 25 (1883) (*Bradley, J.*). In particular, the Maryland Court of Appeals has acknowledged the applicability of the common law innkeeper rule

in Maryland. *Barnes vs. State*, 236 Md. 564, 576-77, 204 A2d 787, 794 (1964); *Drews vs. State*, 224 Md. 186, 191, 167 A2d 341, 343 (1961).

Most of the American cases discussing the common law innkeeper rule may be divided into two categories: those involving constitutional challenges to civil rights legislation, e.g., *Heat of Atlanta Motel, Inc. vs. United States*, *supra*; *Barnes vs. State*, *supra*, and those involving an attempted application of the innkeeper rule to a particular type of "public accommodation", e.g., *Slack vs. Atlantic White Tower System, Inc.*, 181 F.Supp. 124 (D. Md. 1960) (restaurant); *Madden vs. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697, 1 ALR2d 1160 (1947) (race-track); *Drews vs. State*, *supra* (amusement park); *Greenfield vs. Maryland Jockey Club*, 190 Md. 96, 57 A2d 335 (1948) (racetrack); *Bowlin vs. Lyon*, 25 N.W. 766, 67 Iowa 536 (1885) (skating rink). In the former group, the innkeeper rule found gratuitous approval in the context of showing that modern civil rights legislation has ancient roots.<sup>2</sup> In the latter group, the innkeeper rule formed the basis for relief but was rejected as inapplicable to the particular activity involved. Although none of these cases actually applied the common law innkeeper rule to prohibit racial discrimination by innkeepers, or anyone else, the opinions in each of the cases approve such an application in dicta.

Even though the rule may proscribe racial discrimination, it has not usually been interpreted as applying to all types

<sup>2</sup> In Justice Goldberg's concurring opinion in *Bell vs. Maryland*, 378 U.S. 226, 299-300 (1964), the common law innkeeper rule formed part of the basis for arguing that the 14th Amendment was intended to place an affirmative duty upon the states to eliminate racial discrimination in public accommodations.

of "public accommodations". (See cases cited above). The policy underlying the innkeeper rule is one of public necessity. Inns were and are essential for public travel, and, in ancient England, as in some parts of the United States today, they were "few and far between". "The traveler would be at the mercy of the innkeeper, who might practice upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night." Wyman, *The Law of Public Callings as a Solution to the Trust Problem*, 17 Harv. L. Rev. 156, 159 (1903). Since the otherwise prevailing common law rule was that the proprietor of a private business had absolute power to choose his customers, e.g., *Madden vs. Queens County Jockey Club*, *supra*, courts have strictly interpreted the coverage of the innkeeper rule. The English courts have applied the rule to persons providing lodging to transient guests (innkeepers), common carriers, and blacksmiths. See discussion in *Jackson vs. Rogers*, 2 Show. 237 (1683) (Jeffries, C. J.). American courts have been equally restrictive in defining the scope of the rule. The prevailing American rendition of the rule applies it to innkeepers and common carriers.<sup>3</sup> E.g., *Barnes vs. State*, *supra*. Although there might be a question as to its application to barber shops, there is some support for the view that the common law rule applies to all types of public facilities licensed by law. See *Bell vs. Maryland*, *supra*; but cf. *Drews vs. State*, *supra*.

Regardless of the scope of the innkeeper rule, it is clear to this Court that the County Council, sitting in its legislative

---

<sup>3</sup> One can speculate that the rule ought to apply to service stations since they are the modern equivalent of blacksmiths, and they are most certainly heirs to the same degree of public necessity which brought blacksmiths under the rule.

capacity, does have the authority to enact a public accommodations law. This *legislative* authority is not diminished by the fact that the law so enacted merely "implements" or "codifies" a common law rule. The legislative branch has always had the power to modify or codify the common law. *Lutz vs. State*, 167 Md. 12, 15, 172 A 354, 356 (1934). The ordinance here in question, however, was passed in *executive* session.

Therefore, the central and dispositive issue in this case is whether the County Council may utilize its *executive* powers to "implement and administer" a common law rule. Ordinance 4-120 must be evaluated in terms of the scope of the Council's executive powers as they are enumerated in *Montgomery County Charter Article III, Section 3*, and interpreted by the Court of Appeals in *Scull*. It is upon this basis which we are compelled to find that the County Council, sitting in its *executive* capacity, has no power or authority to "implement or administer" a common law rule. Because of this conclusion, we need not now decide whether the common law innkeeper rule may be utilized to prevent racial discrimination in public accommodations and, if so, whether it applies to barber shops.

The County Council in executive session has no authority to "implement" common law rules because such implementation violates the rule announced in *Scull*. The Court said in *Scull* that the Council's executive power may be used to implement or administer "a law already in force and effect". The County here argues that "a law" includes the common law. The Court in *Scull* made it irrefutably clear that by "a law" it meant an ordinance *enacted* by the County Council in *legislative* session. As the Court stated:



“ \* \* \* the Council in executive session \* \* \* may implement and facilitate and insure the proper execution of *laws and ordinances passed by the Council in legislative sessions* \* \* \* as the County Commissioners could have done in regard to public local laws passed by the General Assembly. *That the Council in executive session is to have no power to make law as such is made clear by and emphasized in various provisions of the Charter.*” *Scull*, 249 Md. at 281, 282, 239 A2d at 97-98 (emphasis supplied).

Moreover, in formulating the legislative-administrative test which it announced in *Scull*, the Court relied on and cited *Vanmeter vs. City of Paris*, 273 S.W.2d 49, 50 (Ky. 1954). See *Scull*, 249 Md. at 282-83, 239 A2d at 98. In *Vanmeter* the Court of Appeals of Kentucky stated:

“ \* \* \* the rule is that the power to be exercised is legislative if it prescribes a new policy or plan, and is administrative if it merely pursues a plan *already adopted by the [municipal] legislative body or some power superior to it [such as the state legislature]*.” 273 S.W.2d at 50 (emphasis supplied).

In addition, the Supreme Court of California has had occasion to state that: “ \* \* \* if the action be designed merely to carry into effect *a law already enacted* it may be said to be administrative rather than legislative action.” *Kleiber vs. City and County of San Francisco*, 117 P.2d 657, 659, 18 Cal. 718 (1941) (emphasis supplied).

Finally, the Court of Appeals said in *Scull* that “[i]f an ordinance brings into being a law as distinguished from ordaining an implementation or the administration or execution of *an existing law*, it must be passed at a *legislative*



session of the council." 249 Md. at 284 (emphasis supplied).

From these statements of the rule it is inescapably clear that *Scull*, which is controlling here, limits the executive power of the County to the implementation of legislative enactments. Therefore, the Council may not utilize its executive power to implement a common law rule.

One of the foundations of our democratic institutions is the doctrine of separation of powers. In Maryland, this philosophical principle has been crystallized into a constitutional provision. Article 8 of the *Declaration of Rights of the Constitution of Maryland* provides:

"That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

The policy underlying this provision has been applied in situations involving executive encroachment upon judicial authority. In *Hoke vs. Lawson*, 175 Md. 246, 257 (1938), the Court of Appeals was faced with the question of whether an agreement by a police commissioner regarding the application of a Maryland Gambling law would prevent the court from enjoining certain gambling activities. The Court there noted that "there is in our system no such relation between the courts and the administrative officials as would render agreements by the latter effective to preclude the ordinary action of the courts in applying the law as they find it." Similarly, in *Kentucky vs. Dennison*, 65 U.S. (24 How.) 66 (1860), the Supreme Court of the United States in interpreting Article IV, Section 2 of the United

States Constitution (fugitive extradition clause), concluded that a governor could not demand that a sister state deliver a fugitive "unless the party was charged in the regular course of judicial proceedings". The Court based its decision upon its view that:

"[A]ccording to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department." *Id.* at 104.

As these cases indicate, the judiciary has always had exclusive jurisdiction to interpret and apply the common law. Only *legislative* authority may be exercised so as to codify or modify a common law rule. As the Supreme Court noted in *Munn vs. Illinois*, 94 U.S. 113, 134 (1875), "the common law \* \* \* may be changed at the will, or even at the whim, of the *legislature* \* \* \*, [i]ndeed, the great office of *statutes* is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." (emphasis supplied). The Court of Appeals has long adhered to the principal that the legislature may modify or codify the common law. See *Lutz vs. State*, *supra*. However, unless the common law has been changed by legislative action, it is the duty of the *judiciary* to interpret and apply the common law in Maryland. *Damasiewicz vs. Gorsuch*, 197 Md. 417, 439-40, 79 A2d 550, 560 (1951). Consequently, *Ordinance 4-120*, even if it merely codified a common law rule, was

amenable to legislative process only and, as the product of the county's executive authority, is null and void.

In an effort to overcome the defects of *Ordinance 4-120*, the County makes several additional arguments: First, the County contends that any defect in *Ordinance 4-120* was cured through the enactment of Bill No. 1, Chapter 1 on May 10, 1966, by the County Council. Bill No. 1 provides:

"Be It Enacted by the County Council for Montgomery County, Maryland, that — Sec. 1. The Montgomery County Code 1965, published under the supervision of the County Attorney, be and the same is hereby legalized and made prima facie evidence of the following matters therein contained; a. All local laws \* \* \*."

The County contends that by "legalize" the Council meant to adopt anew all local laws contained in the Code.

Although Bill No. 1, Chapter 1 might be viewed as a "legislative enactment", any fair interpretation of the County's Charter requires that the Council not be permitted to distort the prescribed legislative process. One of the effects of enactment of a "public local law" by legislative process is the right of the people to petition for referendum. *Montgomery County Charter, Article II, §6(a)*. By enacting *Ordinance 4-120* in executive session, that right was avoided. Similarly, because of Bill No. 1's clear purpose (to cure minor publishing or enactment defects) and its broad, equivocal language, it provides little or no effective notice to the populace that any new substantive plan or policy is being "authenticated". In short, Bill No. 1 does not serve sufficiently to apprise the voters of their

right to petition for a referendum on the Public Accommodations Ordinance.

Moreover, a codifying act as broad as this one could not be interpreted as manifesting the Council's intent to re-enact *Ordinance 4-120*. Such overly broad "curative" enactments are ineffective to constitute re-enactment of specific legislation. See *Certain Lots Upon Which Taxes Are Delinquent vs. Monticello*, 31 So.2d 905, 159 Fla. 134 (1947). In fact, overly broad curative enactments have been treated as unconstitutional. E.g., *Town of Davie vs. Hartline*, 199 So.2d 280 (Fla. 1967); cf. *E. McQuillin, 5 Municipal Corporations, Section 16.94 at 341* (3d ed. 1949). Similarly, in *Harve de Grace vs. Bauer*, 152 Md. 521, 527, 137 A 344, 346 (1927) the Court of Appeals held that a legislative adoption and approval of minutes which inaccurately recorded that a resolution had passed did not validate or legitimize the bill because there is no intent when voting on such "procedural" motions to approve substantive legislation. As these cases indicate, Bill No. 1, Chapter 1, did not constitute a legislative enactment of *Ordinance 4-120*.

Second, the County argues that the Supreme Court's interpretation of the Equal Protection Clause in *Hunter vs. Erickson*, 37 U.S.L.W. 4091 (Jan. 20, 1969), requires that the County Council be permitted to enact civil rights ordinances while sitting in executive session. In *Hunter vs. Erickson, supra*, the Court dealt with an amendment to the Akron City Charter which provided that local fair housing ordinances become effective only after their approval by a majority vote of the people. In other words, the amendment singled out housing regulations "based on race" for mandatory referendum, rather than the otherwise prevailing right of the people to petition for referendum. As

the Court said, the Akron amendment constituted "an explicitly racial classification treating racial housing matters differently from other racial and housing matters". 37 *U.S.L.W.* at 4092.

The County's contention that in the case at bar, " \* \* \* we have an analogous situation wherein the County Council can regulate places of business [etc.] \* \* \* through \* \* \* building regulations, etc. without the enactment of a local law \* \* \*" is untenable. The flaw in the "analogy" is that neither the Montgomery County Charter, the Express Powers Act, nor the test enunciated in *Scull* attempt to single out "racial" topics for special procedures. The *Scull* distinction between implementation of existing laws and enactment of new policies applies equally to racial and non-racial topics.<sup>4</sup>

Third, the County contends that racial discrimination in public accommodations is a "badge of slavery" which is forbidden by the 13th Amendment. To be sure, racial discrimination is a "badge of slavery". *Jones vs. Alfred H.*

---

<sup>4</sup> One might argue, which the County does not, that the "old-new" distinction created by *Scull* tends to thwart the passage of local civil rights laws; since most civil rights legislation, would be categorized as a "new policy," it requires a legislative enactment subject to referendum, whereas the remnants of "Jim Crowism" are "old" policies along with other matters not imbued with "racial" consequences and are thus amenable to executive action. Nonetheless, the problems with this argument are several: (A) It at least goes far beyond the holding of *Hunter vs. Erickson* regarding special procedures for racial matters, and probably goes beyond any future application of *Hunter*. (B) It presents an inaccurate picture of the existing legislation. Jim Crow legislation has been largely eliminated and is subject to direct attack under the 14th Amendment, and several civil rights enactments have found their way into the category of "old or existing law".



*Mayer Co.*, 392 U.S. 409, 445-46 (1968) (Douglas, J., concurring). And, racial discrimination in public accommodations in particular imposes such a badge.<sup>5</sup> However, the 13th Amendment has not been interpreted as a self-executing prohibition of all such "badges". In the *Jones* case, both the Court and Justice Douglas concurring agreed that the issue was whether Congress had the power to enact a "fair housing" law (42 U.S.C. §1982) which would proscribe purely private discrimination. See 392 U.S. at 439 (majority opinion); 392 U.S. at 444 (concurring opinion). In finding that the 1866 law *did* and *could* apply to purely private discrimination (i.e., without relying on either the 14th Amendment or the interstate commerce clause), the Court relied upon the power of Congress under Section 2 of the 13th Amendment "to enforce this article by appropriate legislation."

The *Jones* case stands for the power of Congress under Section 2 of the 13th Amendment, not for the self-executing coverage of Section 1 of the 13th Amendment. No court has ever held that the 13th Amendment by itself proscribes all "badges of slavery". See E. S. Corwin, *The Constitution of the United States of America*, 1063-65 (1964 ed.). For these reasons, the County's 13th Amendment argument is also inapposite.

Fourth, the County argues that the right to be free of racial discrimination by private businesses serving the public is one of the enforceable rights recognized by the privileges and immunities clause. Unfortunately, the privileges and

---

<sup>5</sup> The Court in *Jones* indicated that the old view of the *Civil Rights Cases*, 109 U.S. 1, 24 (1883) that racial discrimination in public accommodations was *not* a badge of slavery may no longer command a majority. See *Jones*, 392 U.S. at 441 n. 78.



immunities clause was rendered a "practical nullity" by the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 71, 77-79 (1873). See E. S. Corwin, *The Constitution of the United States of America*, 1076 (1964 ed.). In *Twining vs. New Jersey*, 211 U.S. 78, 97 (1908), the Court enumerated the rights which it considered among the "privileges and immunities" of United States Citizenship. Freedom from private discrimination was not among them. Moreover, although the Court has applied the privileges and immunities clause to ensure freedom of interstate travel, *Edwards vs. California*, 314 U.S. 160 (1941), and to cut down state welfare residency requirements, *Shapiro vs. Thompson*, 37 U.S.L.W. 4333 (April 21, 1969), the Court has never held that the privileges and immunities clause alone proscribes private discrimination in public accommodations. This is not to say that Congress does not have the power to "reach" public accommodations via Section 5 of the 14th Amendment, but that is not at issue here.

For all these reasons, we find that Montgomery County Ordinance 4-120 was enacted by the County Council in violation of its authority under the Charter, and as such is unenforceable as a matter of law.

As we said earlier, our disposition of the case makes it unnecessary to reach the other arguments raised by the Defendant in his demurrer, viz., that the Ordinance does not apply to barber shops, that the State has pre-empted the field, and that the Ordinance violates the Defendant's 13th Amendment right to be free of involuntary servitude.

IT IS THEREUPON, this 12th day of September, 1969, by the Circuit Court for Montgomery County, Maryland,

**ORDERED**, that the Demurrer filed by the Defendant in the above-captioned matter be, and the same is hereby, **SUSTAINED**.

/s/ Irving A. Levine  
**IRVING A. LEVINE**  
Judge of the Circuit Court for  
Montgomery County, Maryland

True Copy Test  
Howard M. Smith  
Clerk

/s/ Howard M. Smith

---



FOLD-OUTS ARE TOO LARGE TO BE FILMED

**71-1186**

No.

FILED  
MAR 13 1972

MICHAEL KODAK, JR., CLERK

**THE COPY**

IN THE

**Supreme Court of the United States**

October Term, 1971

**MURRAY TILLMAN, et al.,**

*Petitioners,*

v.

**WHEATON-HAVEN RECREATION**

**ASSOCIATION, INC., et al.,**

*Respondents.*

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit**

**ALLISON W. BROWN, JR.**

Suite 501, 1424-16th Street, N.W.  
Washington, D.C. 20036

**RAYMOND W. RUSSELL**

22 West Jefferson Street  
Rockville, Maryland 20850

**SAMUEL A. CHAITOVITZ**

30 W. 60th Street  
New York, N.Y. 10023

*Of Counsel:*

**MELVIN L. WULF**

American Civil Liberties Union  
156 Fifth Avenue  
New York, N.Y. 10010

*Attorneys for Petitioners*





## INDEX

	<u>Page</u>
OPINIONS BELOW . . . . .	2
JURISDICTION . . . . .	2
QUESTION PRESENTED . . . . .	2
STATUTORY PROVISIONS INVOLVED . . . . .	2
STATEMENT . . . . .	3
A. Wheaton-Haven Recreation Association, Inc.—its purpose and manner of operation . . . . .	3
B. Wheaton-Haven's racially discriminatory membership and guest policies . . . . .	5
C. Relief sought and proceedings below . . . . .	6
REASONS FOR GRANTING THE WRIT. . . . .	8
CONCLUSION. . . . .	13
APPENDIX A, STATUTORY PROVISIONS . . . . .	A-1
APPENDIX B, OPINION OF THE COURT OF APPEALS . . . . .	B-1
APPENDIX C, OPINION OF THE DISTRICT COURT . . . . .	C-1
APPENDIX D, JUDGMENT OF THE COURT OF APPEALS . . . . .	D-1

## CITATIONS

Cases:

<i>Brown v. Ballas</i> , 331 F. Supp. 1033 (N.D.Tex., 1971). . . . .	10
<i>Caldwell v. National Brewing Co.</i> , 443 F.2d 1044 (C.A. 5, 1971), cert. denied Feb. 22, 1972 . . . . .	9

<i>Collyer v. Yonkers Yacht Club,</i> 17 A.D. 973, 234 N.Y.S.2d 259 (1962) . . . . .	6
<i>Daniel v. Paul,</i> 395 U.S. 298 (1969) . . . . .	7
<i>Grier v. Specialized Skills, Inc.,</i> 326 F.Supp. 856 (W.D.N.C., 1971) . . . . .	10
<i>Hackett v. McGuire Brothers, Inc.,</i> 445 F.2d 442 (C.A. 3, 1971) . . . . .	9
<i>Hyde v. Woods,</i> 4 Otto 523 (1877) . . . . .	6
<i>Jones v. Mayer Co.,</i> 392 U.S. 409 (1968) . . . . .	9, 10, 15
<i>Lee v. Southern Home Sites Corp.,</i> 429 F.2d 290 (C.A. 5, 1970), 444 F.2d 143 (C.A. 5, 1971). . . . .	10
<i>McLaurin v. Brusturia,</i> 320 F.Supp. 190 (E.D.Wis., 1970) . . . . .	10
<i>Page v. Edmunds,</i> 187 U.S. 596 (1903) . . . . .	6
<i>Scott v. Young,</i> 421 F.2d 143 (C.A. 4, 1970), cert. denied, 398 U.S. 929. . . . .	10
<i>Smith v. Sol D. Adler Realty Co.,</i> 436 F.2d 344 (C.A. 7, 1971) . . . . .	10
<i>Sullivan v. Little Hunting Park,</i> 396 U.S. 229 (1969) . . . . .	2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
<i>Terry v. Elmwood Cemetery,</i> 307 F.Supp. 369 (N.D. Ala., 1969). . . . .	10
<i>United States v. Central Carolina Bank &amp; Trust Co.,</i> 431 F.2d 972 (C.A. 4, 1970) . . . . .	7
<i>Walker v. Pointer,</i> 304 F.Supp. 56 (N.D.Tex., 1969). . . . .	6

<i>Waters v. Wisconsin Steel Works</i> , 427 F.2d 476, (C.A. 7, 1970), cert. denied, 400 U.S. 911. . . . .	9
<i>Young v. International Tel. &amp; Tel. Co.</i> , 438 F.2d 757 (C.A. 3, 1971) . . . . .	9

Statutes:

Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) . . . . .	2, 6, 7, 9, 10, 12, 14, 15
Civil Rights Act of 1964 (42 U.S.C. § 2000a) . . . . .	2, 7, 8, 14, 15
Internal Revenue Code (26 U.S.C. § 501(c)(7)). . . . .	5
Maryland Code Annotated Art. 81, § 288(d)(8) . . . . .	5

Miscellaneous:

17 Am. Jr. 2d, Contracts, §§ 302-319 . . . . .	6
Restatement (Second) of Torts, §§ 330, 332 (1965) . . . . .	6
(Washington) Evening Star (April 25, 1969) . . . . .	8
Washington Post (June 12, 1967) . . . . .	8

1874

Jan 1st - 1874

Feb 1st - 1874

Mar 1st - 1874

Apr 1st - 1874

May 1st - 1874

Jun 1st - 1874

Jul 1st - 1874

Aug 1st - 1874

Sep 1st - 1874

Oct 1st - 1874

Nov 1st - 1874

Dec 1st - 1874

1875

Jan 1st - 1875

Feb 1st - 1875

Mar 1st - 1875

Apr 1st - 1875

May 1st - 1875

Jun 1st - 1875

Jul 1st - 1875

Aug 1st - 1875

Sep 1st - 1875

Oct 1st - 1875

Nov 1st - 1875

Dec 1st - 1875

1876

Jan 1st - 1876

Feb 1st - 1876

Mar 1st - 1876

Apr 1st - 1876

May 1st - 1876

Jun 1st - 1876

Jul 1st - 1876

Aug 1st - 1876

Sep 1st - 1876

Oct 1st - 1876

Nov 1st - 1876

Dec 1st - 1876

1877

Jan 1st - 1877

Feb 1st - 1877

Mar 1st - 1877

Apr 1st - 1877

May 1st - 1877

Jun 1st - 1877

Jul 1st - 1877

Aug 1st - 1877

Sep 1st - 1877

Oct 1st - 1877

Nov 1st - 1877

Dec 1st - 1877

1878

Jan 1st - 1878

Feb 1st - 1878

Mar 1st - 1878

Apr 1st - 1878

May 1st - 1878

Jun 1st - 1878

Jul 1st - 1878

Aug 1st - 1878

Sep 1st - 1878

Oct 1st - 1878

Nov 1st - 1878

Dec 1st - 1878

1879

Jan 1st - 1879

Feb 1st - 1879

Mar 1st - 1879

Apr 1st - 1879

May 1st - 1879

Jun 1st - 1879

Jul 1st - 1879

Aug 1st - 1879

Sep 1st - 1879

Oct 1st - 1879

Nov 1st - 1879

Dec 1st - 1879

1880

Jan 1st - 1880

Feb 1st - 1880

Mar 1st - 1880

Apr 1st - 1880

May 1st - 1880

Jun 1st - 1880

Jul 1st - 1880

Aug 1st - 1880

Sep 1st - 1880

Oct 1st - 1880

Nov 1st - 1880

Dec 1st - 1880

IN THE  
**Supreme Court of the United States**

October Term, 1971

---

No.

---

MURRAY TILLMAN, *et al.*,

*Petitioners,*

v.

WHEATON-HAVEN RECREATION  
ASSOCIATION, INC., *et al.*,

*Respondents.*

---

Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

---

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.<sup>1</sup>

---

<sup>1</sup> Petitioners, in addition to Murray Tillman, are Rosalind N. Tillman, his wife, Dr. Harry C. Press and Francella Press, his wife, and Mrs. Grace Roemer. Respondents, in addition to Wheaton-Haven Recreation Association, Inc., are Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, Richard E. McIntyre, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr. and James M. Whittles, individuals who were officers and/or directors of said corporation at times material herein.

### OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, pp. B-1-31) is reported at 451 F.2d 1211. The district court's opinion is unreported (App. C, *infra*, pp. 1-13).

### JURISDICTION

The judgment of the court of appeals was entered on October 27, 1971. A petition for rehearing and suggestion for rehearing *en banc* was duly filed, and the court of appeals entered its order of denial on December 16, 1971 (App. D, *infra*, D-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTION PRESENTED

Whether the court of appeals erred in holding a community recreation association to be a private club and hence exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C. §§ 1981, 1982 and 42 U.S.C. § 2000a), despite the fact that this Court in a previous case (*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969)) held that an association with virtually identical characteristics could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.

### STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) and Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a). They are set forth in App. A, *infra*, pp. A-1-2).



STATEMENT<sup>2</sup>A. WHEATON-HAVEN RECREATION ASSOCIATION,  
INC. — ITS PURPOSE AND MANNER OF OPERA-  
TION

Wheaton-Haven Recreation Association, Inc. is a non-profit Maryland corporation organized in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Maryland. The pool was financed by subscriptions for membership collected from persons residing in the area. The pool presently charges a \$375 initiation fee and an annual dues of \$150-\$160. The by-laws of the association provide that membership "shall be open to bonafide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool" (by-laws, art. III, §1).<sup>3</sup> Members may be taken from outside the three-quarter mile radius upon the recommendation of a member as long as members from outside the area do not exceed 30 percent of the total membership.<sup>4</sup> In either event, applicants for membership must be approved by "an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose" (by-laws, art. III, §3).

---

<sup>2</sup> The facts stated herein are based on the district court's findings as modified by the court of appeals.

<sup>3</sup> Wheaton-Haven's by-laws (Def. Exh. 1) are contained in the appendix to appellants' brief in the court of appeals.

<sup>4</sup> At times when the membership rolls are full, applicants for membership are limited to the geographic area within a three-quarter mile radius of the pool, and such applications are considered in chronological order of receipt (by-laws art. III, §3).

Membership, which is by family units rather than by individuals, is limited to 325 families. If a member who is also a homeowner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors (by-laws, art. VI).

Only members and their guests are admitted to the pool. Members of the general public cannot gain admittance by payment of an entrance fee.

The Wheaton-Haven pool was constructed in 1958-1959 by a contractor from outside the State of Maryland. The pool's operation involves the use of pumps, a motor and a chlorine feeder, all manufactured outside of Maryland. There are also snack vending machines. All of these facilities are in an enclosed area accessible only to members and their guests.

The pool was constructed pursuant to a "special exception" granted by the Montgomery County Board of Appeals under the county's zoning ordinance.<sup>5</sup> Prior to granting the exception, the zoning authority required Wheaton-Haven to demonstrate its financial responsibility by submitting evidence that 60 percent of its projected construction costs were obligated or subscribed.

---

<sup>5</sup> The provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955. In the ordinance, the Council stated, "... this action sets up the community swimming pools as a special exception . . . Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefited by such development" (Admiss. Nos. 1, 2, Pl. Exh. 2).

Wheaton-Haven pays state and local property taxes, but is exempt from state and federal income taxes under Maryland Code Ann. Art. 81, §288(d)(8), and section 501(c)(7) of the Internal Revenue Code (26 U.S.C. §501(c)(7)) exempting non-profit, member-owned and controlled recreational facilities.

#### **B. WHEATON-HAVEN'S RACIALLY DISCRIMINATORY MEMBERSHIP AND GUEST POLICIES**

Dr. and Mrs. Harry C. Press, two of the Negro plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of Wheaton-Haven. In the spring of 1968, Dr. Press sought to obtain a membership application from members of the association's Board of Directors, who declined to furnish him with an application. The stipulated reason for their refusal was his race.

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. On July 19, 1968, the Tillmans brought Mrs. Grace Rosner, a Negro, to the pool as their guest. She was admitted. The following day, at a special meeting, the Board of Directors promulgated a rule limiting guests to relatives of members. Mrs. Rosner has been refused admission as a guest of the Tillmans since then. The new guest policy was adopted in response to the Tillman's bringing a Negro guest to the pool, though it was intended also to reduce the burgeoning number of guests using the pool.<sup>6</sup>

---

<sup>6</sup> At a meeting of the association's members in the fall of 1968, a resolution was adopted reaffirming Wheaton-Haven's policy of not admitting Negroes to its facilities.

### C. RELIEF SOUGHT AND PROCEEDINGS BELOW

Petitioners seek declaratory and injunctive relief, as well as damages. Dr. and Mrs. Press claim that Wheaton-Haven's denial of membership to them because of race violates their rights under 42 U.S.C. §§1981, 1982 on the ground that purchase of a membership share involves making a contract, and also that membership in the nonstock corporation constitutes personal property.<sup>7</sup> Since the availability of membership in the association, in addition, is an asset which enhances the value of homes in the neighborhood, and entitles the member to convey a first option to membership to the purchaser of his home, Dr. and Mrs. Press' inability to acquire a membership also deprives them of real property interests which are available to white persons. Mr. and Mrs. Tillman base their claim for relief on the ground that their membership in the Wheaton-Haven association is both a contract and a property interest which, under 42 U.S.C. §§1981, 1982, may not be impaired for racial reasons.<sup>8</sup> Finally, Mrs. Rosner claims violation of her rights under 42 U.S.C. §§1981, 1982, since as the guest of the Tillmans, she has an enforceable interest as a third party beneficiary of the Tillman's membership contract, or, viewing their membership as property, she has an implied easement of ingress and egress, or a license, which constitutes property.<sup>9</sup>

---

<sup>7</sup> See *Hyde v. Woods*, 4 Otto 523 (1877); *Page v. Edmunds*, 187 U.S. 596 (1903).

<sup>8</sup> See *Sullivan v. Little Hunting Park*, *supra*, 396 U.S. at 237 (1969); *Walker v. Pointer*, 304 F. Supp. 56, 58-61 (N.D. Tex., 1969).

<sup>9</sup> See *Walker v. Pointer*, *supra*, 304 F. Supp. at 60-62; *Collyer v. Yonkers Yacht Club*, 17 A.D. 973, 234 N.Y.S. 2d 259 (1962); Restatement (Second) of Torts, §§330, 332 (1965); 17 Am. Jur.2d, Contracts, §§302-319.

Petitioners also base their claims for relief on the Civil Rights Act of 1964 (42 U.S.C. 2000a) which prohibits racial discrimination in any "place of public accommodation," defined in the statute to include any "place of entertainment" affected by state action or where interstate commerce is involved. Since Wheaton-Haven was constructed by a contractor from outside the State of Maryland and operation of the pool involves the use of machinery and equipment manufactured in other states, the necessary link to interstate commerce is present, thus bringing the facility within the definition of a "place of public accommodation" as contained in the 1964 Act.<sup>10</sup>

The district court denied the relief sought by plaintiffs, and granted summary judgment to defendants below (App. C., *infra*, pp. C-1-13). Before the court of appeals, plaintiffs' motion for summary reversal was denied, and following consideration of the merits, a majority of the panel (Haynsworth, Chief Judge, and Boreman, Circuit Judge) affirmed the district court, holding that Wheaton-Haven is a "private club" and hence exempt from the Civil Rights Act of 1866 as well as the Civil Rights Act of 1964 (App. B, *infra*, pp. B-1-23). Judge Butzner, dissenting, would have granted plaintiff's motion for summary reversal of the district court. He found the case to be "indistinguishable in all material aspects" from *Sullivan v. Little Hunting Park*, *supra*, and hence termed the majority decision "a marked departure from authoritative precedent" (App. B, *infra*, p. B-23). Judges Winter and Craven dissented from the court's denial of rehearing

---

<sup>10</sup> See *Daniel v. Paul*, 395 U.S. 298 (1969); *United States v. Central Carolina Bank & Trust Co.*, 431 F.2d 972 (C.A. 4, 1970).



*en banc*, expressing their agreement with Judge Butzner's view that the case is indistinguishable from *Sullivan* (App. B, *infra*, p. B-31). Finally, all three dissenting judges deplored the majority's holding that the 1866 Act was impliedly repealed in part by the 1964 Act. (See discussion *infra*, pp. 14-15, n. 15.)

### REASONS FOR GRANTING THE WRIT

The court of appeals' decision sanctions racial discrimination in circumstances in which this court specifically held it to be unlawful. The decision is in square conflict with *Sullivan v. Little Hunting Park*. Because the court of appeals failed to follow the controlling precedent of that case, its decision should be reversed.

Both this case and *Sullivan* involve voluntary associations organized by residents of a neighborhood to provide recreation facilities, principally a swimming pool, for themselves and others in the area. In each instance, purchase of a membership share entitles all persons in the immediate family of the shareholder to use the association's facilities.<sup>11</sup> In neither case did the association pursue a policy of exclusiveness or selectivity in admitting

---

<sup>11</sup> Cooperatively established recreation associations organized to operate neighborhood swimming pools are particularly common in areas where public swimming pools and beaches are not readily accessible. Petitioners' brief to this Court in the *Sullivan* case (p. 24) noted that in the Northern Virginia suburbs of Washington, D.C., where Little Hunting Park is located there are about 50 community pool associations; there are about 42 such associations in Montgomery County, Maryland, where Wheaton-Haven is located. Source: *The Washington Post*, p. A-20, June 12, 1967; *The (Washington) Evening Star*, p. B-1, Noon edition, April 25, 1969.



members until a black resident of the neighborhood sought the privileges of membership for himself and his family. In *Sullivan*, as here, the court below held that the association could properly exclude the black applicant on the ground that the association was a "private club." However, this Court in *Sullivan* reversed the lower court, and rejected the claim that Little Hunting Park was free to discriminate on racial grounds because it was a private club. In terms equally applicable to Wheaton-Haven, the Court stated (396 U.S. at 236):

[W]e find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race.

*Sullivan*, and its predecessor, *Jones v. Mayer Co.*, 392 U.S. 409 (1968), establish beyond question that the Civil Rights Act of 1866 reaches beyond state action and is a prohibition against private discrimination based on race in many circumstances where it had previously been considered lawful. The 1866 statute, by its terms, bars racial discrimination in a variety of transactions involving identifiable contract or property interests. Hence, the courts eschewing "a narrow construction of the language" of the Act, as this Court advised in *Sullivan* (396 U.S. at 237), have enforced the statutory provisions to prohibit private discrimination in employment (e.g., *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (C.A. 5, 1971) and cases cited therein, cert. denied Feb. 22, 1972; *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757, 758-760 (C.A. 3, 1971); *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442 (C.A. 3, 1971); *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 481-488 (C.A. 7, 1970), cert. denied,

400 U.S. 911), in housing (e.g., *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (C.A. 5, 1970), 444 F.2d 143 (C.A. 5, 1971)); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349 (C.A. 7, 1971); *McLaurin v. Brusturis*, 320 F. Supp. 190 (E. D. Wis., 1970); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex., 1971)); in admission to an outdoor recreational facility (*Scott v. Young*, 421 F.2d 143, 145 (C.A. 4, 1970), cert. denied, 398 U.S. 929, in admission to a trade school (*Grier v. Specialized Skills, Inc.*, 326 F.Supp. 856 (W.D.N.C., 1971)), and in the purchase of a cemetery plot (*Terry v. Elmwood Cemetery*, 307 F.Supp. 369 (N.D. Ala., 1969)).

The foregoing authorities as well as others interpreting the Civil Rights Act of 1866 stem from this Court's holding in *Jones v. Mayer Co.*, *supra*, that the 1866 law demonstrates a Congressional intent "to prohibit *all* racially motivated deprivations of rights enumerated in the statute . . ." (emphasis in original) 392 U.S. at 426. The *Sullivan* decision likewise reflects observance of this principle. However, the court of appeals' decision herein constitutes a rejection of the principle. Indeed, the court's refusal to follow *Sullivan* represents a rejection of the fundamental principle of *stare decisis* upon which our legal system is based.

Faced with the compelling precedent of *Sullivan*, and the unassailable conclusion of Judges Butzner, Winter and Craven, in dissent, that this case is indistinguishable from *Sullivan*, the court of appeals' majority assumed differences between the two cases where in fact none exist, and constructed a false factual analysis of the two cases to support its determination not to be bound by *Sullivan*.<sup>12</sup>

<sup>12</sup> The Court of Appeals did not rely on the district court's rationale for determining that Wheaton-Haven is a private club, but instead stated its own factual grounds to support its conclusion.

1. The court of appeals made the *clearly erroneous* assumption that Little Hunting Park's recreation facilities, which were involved in *Sullivan*, were built by the same real estate developers who built the subdivisions named in that organization's by-laws, and that therefore the right to use those facilities is incidental to the acquisition of a lot in one of those subdivisions (App. B, *infra*, pp. B-9, n. 8, B-16). The record of the *Sullivan* proceeding in this Court was before the court of appeals and the court's attention was called to the fact that there was no connection between Little Hunting Park and any commercial builder, and that the association there, like Wheaton-Haven, is a voluntary organization formed by residents of an area who joined together to build and operate a neighborhood recreation facility.<sup>13</sup>

2. The court of appeals made the *clearly erroneous* finding that the option to buy a membership in Wheaton-Haven which the purchaser of a home obtains when his vendor resigns his membership is "utterly without use or value" (App. B, *infra*, p. B-13). The court arrived at this finding by erroneously relying on the unsubstantiated claim of defendant's counsel at oral argument that Wheaton-Haven's membership had been 260 families for several years, less than its maximum limit of 325 (App. B, *infra*, p. B-2, n. 1). The Court reasoned that the option has no value unless the membership rolls are full. When it was pointed out in the petition for rehearing that the membership rolls were full to the 325 maximum in the spring of 1968 when Dr. Press sought to be put on the waiting list, the court corrected its findings

<sup>13</sup> *Sullivan* Supreme Court Appendix 24-36, 45. The printed Appendix to the briefs which was used in this Court in *Sullivan* was submitted to the court of appeals, and the majority opinion cites several facts about that case which are ascertainable only from the Appendix.

to reflect full membership at that time (App. B, *infra*, p. B-30). However, the court did not alter its conclusion that the option is of no use or value. The court's adherence to its conclusion, despite the demonstrated error of its underlying factual finding illustrates the narrow approach taken by the court to this case. Its opinion is based on previously arrived at determinations, and facts are fashioned to provide their justification. In point of fact the question of whether Wheaton-Haven's membership rolls are full, or not full, at any given time has nothing to do with whether the purchase of a membership share involves contractual and property interests falling within the protection of 42 U.S.C. §§1981, 1982. However, by relying on this and other irrelevant factors in analyzing this case and *Sullivan*, the court seizes upon wholly invalid grounds for distinguishing the two cases.

3. The court of appeals made the *clearly erroneous* assumption that in order to be eligible for membership in Little Hunting Park one is required to reside in, or own a home in, a prescribed geographic area (App. B, *infra*, p. B-15). The record of the *Sullivan* case shows that out of an authorized membership of 600, 133 members resided in areas outside of those named in the by-laws (Sup. Ct. App. 163-164). At least 25 of the 133 nonresident members lived outside of the prescribed area at the time they acquired membership, and there is no evidence that at the time of acquiring membership any of them owned property in that area (Sup. Ct. App. 221).<sup>14</sup>

<sup>14</sup> Contrary to the court of appeals' supposition (App. B, *infra*, p. B-15, n. 17), the Little Hunting Park eligibility area was extended several times to include areas in addition to the four subdivisions specified in the by-laws (Sup. Ct. App. 219-220). Further, there is no basis for the court's the "leap to suppose" (App. B, *infra*, p. B-15, n. 17) that

(continued)

4. The court of appeals made the *clearly erroneous* assumption that Wheaton-Haven has a greater degree of "exclusivity" than Little Hunting Park, because of the fact that in Wheaton-Haven's 11-year history one white person was rejected for membership by the board of directors (App. B, *infra*, p. B-21). The court completely ignores the fact from the *Sullivan* record, which was brought to its attention, that in the 12 years of Little Hunting Park's existence its board of directors also *rejected one white applicant for membership* (Sup. Ct. App. 127).

The court compounded this error by going *dehors* the record to rely on the unsupported claim of defendants' counsel made at oral argument that "numerous" other unidentified white prospective members were informally rejected for membership by being denied an application form (App. B, *infra*, p. B-21, n. 23). This claim conflicts with defendants' sworn answer to plaintiffs' interrogatory No. 17, which indicates that no one other than Dr. Press was ever denied an application form. The court's uncritical acceptance of the unsubstantiated claim of counsel concerning an important element in the case was not only prejudicial to the plaintiffs but constitutes a marked departure from normal appellate court practice.

### CONCLUSION

There seldom are two cases more alike factually than this case and *Sullivan v. Little Hunting Park*. The court of appeals' refusal to bound by that recent precedent

---

<sup>14</sup> (continued) such additional areas were opened by the same developers who had opened the original four. The sub-divisions surrounding Little Hunting Park were built long before the recreation association was organized, and builders had nothing to do with its formation (Sup. Ct. App. 24-36, 45).



constitutes a serious breach of the principle of *stare decisi*, a cornerstone of our legal system. The court's action should not be allowed to stand uncorrected. Accordingly, the petition for a writ of certiorari should be granted.<sup>15</sup>

Respectfully submitted,

ALLISON W. BROWN, JR.

Suite 501, 1424-16th St., N.W.  
Washington, D.C. 20036

RAYMOND W. RUSSELL

22 West Jefferson Street  
Rockville, Maryland 20850

SAMUEL A. CHAITOVITZ

30 W. 60th Street  
New York, N.Y. 10023

*Of Counsel:*

MELVIN L. WULF

American Civil Liberties Union  
156 Fifth Avenue  
New York, N.Y. 10010

*Attorneys for Petitioners*

March 1972.

---

<sup>15</sup> In view of the holding of the *Sullivan* case that a community recreation association such as Wheaton-Haven lacks a "plan or purpose of exclusiveness" — the principal characteristic of a private club — it is apparent that Wheaton-Haven does not fall within the "private club" exemption contained in the Civil Rights Act of 1964 (42 U.S.C. §2000a(e)). Hence, since Wheaton-Haven has the necessary link to interstate commerce (*supra*, p. 4), the racial discrimination practiced here is violative of the 1964 Act.

The court of appeals, in its discussion of the 1964 Act and the Civil Rights Act of 1866, erroneously found that inclusion of the private club exemption in the 1964 Act serves to carve out a

(continued)



<sup>15</sup> (continued) similar exemption in the 1866 Act. This holding, as the dissenters noted, is of doubtful pertinency, and in any event, is in direct conflict with established authority. The court's circumscription of the 1866 Act by reliance on the more restricted 1964 Act is contrary to the express holding in *Sullivan*, where this Court stated (396 U.S. at 237):

We noted in *Jones v. Mayer Co.*, that the Fair Housing Title of the Civil Rights Act of 1968, 82 Stat. 81, in no way impaired the sanction of §1982. 392 U.S. at 413-417. What we said there is adequate to dispose of the suggestion that the Public Accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided by the 1964 Act is not at war with survival of the principles embodied in §1982.



## **APPENDIX A**

The relevant provisions of the Civil Rights Act of 1866, as incorporated in 42 U.S.C. Secs. 1981, 1982, are as follows:

**Sec. 1981.** All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts \* \* \* as is enjoyed by white citizens \* \* \*.

**Sec. 1982.** All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The relevant provisions of Title II of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000a) are as follows:

**Sec. 201(a)** (42 U.S.C. Sec. 2000a(a)). All persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

**Sec. 201(b)** (42 U.S.C. Sec. 2000a(b)). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce \* \* \*:

\* \* \*

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; \* \* \*

\* \* \*

Sec. 201(c) (42 U.S.C. Sec. 2000a(c)). The operations of an establishment affect commerce within the meaning of this title if \* \* \* (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; \* \* \*

\* \* \*

Sec. 201(e) (42 U.S.C. Sec. 2000a(e)). The provisions of this title shall not apply to a private club or other establishment not in fact open to the public \* \* \*

\* \* \*

---

## **APPENDIX B**

**Murray TILLMAN et al., Appellants,**

**v.**

**WHEATON-HAVEN RECREATION AS-  
SOCIATION, INC., et al., Appellees.**

**No. 14957.**

**United States Court of Appeals,  
Fourth Circuit.**

**Oct. 27, 1971.**

**Rehearing and Suggestion for Re-  
hearing En Banc Denied  
Dec. 16, 1971.**

\* \* \* \* \*

Allison W. Brown, Jr., Washington, D.C. (Raymond W. Russell, Rockville, Md., on the brief), for appellants.

Henry J. Noyes, Rockville, Md., and H. Thomas Howell, Baltimore, Md. (John H. Mudd, Baltimore, Md., on the brief), for appellees.

Philip J. Tierney, Asst. County Atty., for Montgomery County, Maryland (David L. Cahoon, County Atty., Alfred H. Carter, Deputy County Atty., and Stanley D. Abrams, Asst. County Atty., for Montgomery County, Md., on the brief), for Montgomery County, Maryland, amici curiae.

Before HAYNSWORTH, Chief Judge, and BOREMAN and BUTZNER, Circuit Judges.

**HAYNSWORTH, Chief Judge:**

The question is whether the Wheaton-Haven Recreation Association, a non-profit group operating a member-owned swimming pool, is required to admit persons as members or guests without regard to race. We find neither the



Civil Rights Act of 1866 (42 U.S.C.A. §§1981 & 1982) nor the Civil Rights Act of 1964 (42 U.S.C. §2000a et seq.) applicable to this association and affirm the order of the District Court granting summary judgment for the defendants.

The pertinent facts are not in dispute, and, as stated by the District Court, are as follows:

Wheaton-Haven was organized in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Maryland. The pool was financed by subscriptions for membership collected from persons residing in the area. The pool presently charges a \$375 initiation fee and annual dues of \$50-\$60. Under the by-laws, membership is open to "bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool." Members may be taken from anywhere outside the three-quarter mile radius upon the recommendation of a member as long as members from outside the area do not exceed thirty per cent of the total membership. In either event, applicants for membership must be approved by "an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose."

Membership, which is by family units rather than by individuals, was limited to 325 families, but that limit has never been reached.<sup>1</sup> In practical application, membership is not limited to the geographic area. If a member

---

<sup>1</sup> Membership figures are not in the record. However, counsel for the defendants stated in oral argument that membership has been held at approximately 260 families for several years.



B-3

who is also a homeowner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors.

Only members and their guests are admitted to the pool. Members of the general public cannot gain admittance by payment of an entrance fee.

Dr. and Mrs. Harry C. Press, two of the Negro plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of Wheaton-Haven. In 1968 Dr. Press sought to obtain an application for membership from members of the Board of Directors, who declined to furnish him with an application. The stipulated reason for their refusal was his race.

Mr. and Mrs. Murray Tillman are members of Wheaton-Haven. The Tillmans brought Mrs. Grace Rosner, a Negro, to the pool as their guest. She was admitted. Within a few days, Wheaton-Haven promulgated a rule limiting guests to relatives of members. Mrs. Rosner has been refused admission as a guest of the Tillmans since then. Her admission on the first occasion was at least partially responsible for the adoption of the guest limitation rule, although it was also intended to reduce the burgeoning number of guests using the pool.

The pool was constructed by a Virginia building contractor. The pool's operation involves the use of machinery manufactured outside Maryland. Snack vending machines are located in the pool area. All of the facilities are in an enclosed area accessible only to members and their guests.

Construction of the pool was done pursuant to a special exception under the zoning ordinances of Montgomery County, Maryland granted by the Montgomery County Board of Appeals. A special exception is unlike a variance; its grant is required whenever an applicant demonstrates compliance with certain conditions. Wheaton-Haven was required to demonstrate its financial responsibility by submitting evidence that 60 per cent of its projected construction costs were obligated or subscribed.

Wheaton-Haven pays state and local real property taxes but is exempt from state and federal income taxes under Md. Code Ann., Art. 81, §288(d)(8) and 26 U.S.C.A. §501(c)(7).

The plaintiffs contend that Wheaton-Haven's discriminatory denial of membership to Dr. Press violates 42 U.S.C.A. §§1981 and 1982<sup>2</sup> on the ground that membership is a species of personal property or a form of leasehold interest in real property, the right to purchase which may not be denied him by any person on the ground of his race. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189. Alternatively, admission to membership is said to be a contract between the association and the member, and the right to make such a contract may not be denied him by the association because he is a Negro. Mrs. Rosner is said to have an

<sup>2</sup> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts \* \* \* as is enjoyed by white citizens \* \* \*." 42 U.S.C.A. §1981.

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C.A. §1982.

enforceable interest in the Tillmans' membership contract as a third party beneficiary, or, if their membership be considered as a leasehold, she has an enforceable easement of ingress and egress.

The plaintiffs further argue that Wheaton-Haven is a "covered establishment" under the Civil Rights Act of 1964 (42 U.S.C.A. §2000a) as a place of entertainment affecting commerce, and that it does not qualify for the "private club" exemption from the Act's requirement of non-discrimination because, as a matter of law, it is not private under the principles of *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386.

# I

In arguing that Wheaton-Haven's racial limitation on membership is forbidden by the 1866 Civil Rights Act, the plaintiffs perforce seek the application of the interpretation placed upon §1982 in *Jones v. Alfred H. Mayer Co.*, *supra*. Their reliance on *Jones* is misplaced, for in that case the Supreme Court had to consider only the Act of 1866. It was not faced with the question whether a specific provision of a subsequently enacted statute may have limited its effect.<sup>3</sup> This appeal does present that question. If §§1981 and 1982 may be said to cover the admission of members or guests to a recreational facility, and to forbid racial discrimination in their selection, it is beyond question that the same conduct is covered by the Act of 1964.

However, the Act of 1964 contains an express proviso that in certain limited cases, involving the admissions

<sup>3</sup> The Open Housing Act of 1968, which was not in effect at the time of the *Jones* decision, would have expressly prohibited the discriminatory action involved in that case.

policies of "a private club or other establishment not in fact open to the public,"<sup>4</sup> racial discrimination is not forbidden. This exception to the ban on racial discrimination of necessity operates as an exception to the Act of 1866, in any case where that Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act.<sup>5</sup>

<sup>4</sup> 42 U.S.C.A. §2000a(e).

<sup>5</sup> We do not suggest that a practice formerly forbidden by §§1981 and 1982 has, by implication, been repealed by the failure of §2000a, later enacted, also to prohibit it. Repeal by implication is not favored in statutory construction. *Jones v. Alfred H. Mayer Co.*, *supra*, n. 20 at 416, 88 S.Ct. 2186; *United States v. Borden Co.*, 308 U.S. 188, 198-199, 60 S.Ct. 182, 84 L.Ed. 181. We have here not the mere failure in a later statute to include a prohibition contained in an earlier one covering the same subject matter; rather, to the earlier general statute, which might arguably prohibit the defendant's conduct, is added a later one which expressly protects it, if the defendant is in fact a private club.

Nor can it be argued that the exemption contained in the 1964 Act merely exempted private clubs from its remedial portions, while leaving exempted organizations subject to substantive prohibitions contained in the 1866 Act. Although later interpretations of §§1981 and 1982 have rendered its assumption dubious, it is unquestionable that in 1964 Congress acted in the belief that in outlawing discrimination in public accommodations, it was writing on a clean slate. The Senate report notes that the one previous congressional enactment of a sweeping public accommodations law had been declared unconstitutional by the Supreme Court in 1883, and much of the report was devoted to a discussion in support of congressional authority to prohibit discrimination. S.Rep. No. 872, 1964 U.S.Code Cong. & Admin. News, pp. 2355, 2366. The Act generated an almost unparalleled amount of debate in Congress and in the nation at large, and its exceptions were subjected to particular scrutiny. "Mrs. Murphy's roominghouse" came into the language as a generic classification during the debates. The remarks of both proponents and opponents of the Act make it clear that it was intended to outlaw racial discrimination in the furnishing of certain kinds of goods and

(continued)

Consequently, §§1981 and 1982 are unavailable to the plaintiffs as a separate and independent basis for relief. If Wheaton-Haven is a private club as defined in the 1964 Act, the exemption contained in that Act is equally applicable to the earlier statutes.

## II

Since the decision in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386, the analysis of an organization's claim to exemption from federal requirements of non-discrimination has acquired a double aspect. The threshold question is whether the organization is one which satisfies the traditional tests of privacy. See *Daniel v. Paul*, 395 U.S. 298, 89 S. Ct. 1697, 23 L. Ed. 2d 318, *NeSmith v. Y.M.C.A. of Raleigh, North Carolina*, 4 Cir., 397 F.2d 96, *United States v. Richberg*, 5 Cir., 398 F.2d 523. *Sullivan* introduced an additional consideration, however. To qualify for the exemption an

<sup>5</sup> (continued) services, except in the case of a few types of very small businesses and private organizations, to which no prohibition against discrimination was to extend. See remarks of Sen. Humphrey and Sen. Long, 110 Cong. Rec. 13697. Congressmen both favoring and opposing the enactment of a public accommodations law attacked the Act as written for making distinctions between permitted and prohibited discrimination. See H. Rep. No. 914, *Additional Majority Views of Rep. Kastenmeier*, 1964 U.S. Code Cong. & Admin. News, pp. 2391, 2409; *Separate Minority Views of Reps. Poff and Cramer*, Id., p. 2462. The majority, however, justified the exemption for private clubs as an appropriate recognition of rights of privacy and associational preferences in cases "where freedom of association might logically come into play \* \* \*." *Additional [Majority] Views on H.R. 7152 of Reps. McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell*, Id., p. 2487 at p. 2495.



organization must not only be private internally; it must, in addition, be not so intimately related to an establishment or transaction in which non-discrimination is required that it can be said to be a part of, or its membership an incident to, the larger, basically commercial, establishment or transaction. If such a relationship exists, the organization, no matter how internally private it may be, will be subjected to any requirement of non-discrimination that may be applicable to the other.<sup>6</sup> Because *Sullivan* involved an organization similar in many respects to Wheaton Haven, the plaintiffs strongly urge that the case requires that, as a matter of law, Wheaton-Haven be declared not to be a private club. This argument, we think, ignores certain fundamental differences between the two organizations and fails to appreciate the significance of the Supreme Court's holding in *Sullivan*.

Little Hunting Park is a Virginia non-stock corporation which operates recreational facilities. Its membership was limited to persons who resided in or owned property in the Bucknell Manor, Beacon Manor, White Oaks and Bucknell Heights residential subdivisions in Fairfax County, Virginia.<sup>7</sup> The number of membership shares which any

<sup>6</sup> This rule is perhaps foreshadowed by the qualification to the exemption of private clubs contained in §2000a. A club, though private, is not exempt "to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) [defining covered places of public accommodations] of this section." 42 U.S.C.A. §2000a(e). Thus, a private club which, for example, opened its doors to patrons of a particular hotel would be required to admit all such patrons without regard to race, even though it might still be able to adopt a racial admissions policy with respect to others.

<sup>7</sup> The Board of Directors was authorized to designate other specific areas from which members might be drawn. In addition, a person might retain his membership after moving away from the designated subdivisions.



person might own was limited only by the number of lots he owned in the named subdivisions.<sup>8</sup> Paul Sullivan owned a house in the designated area and, in consequence, owned a membership share in Little Hunting Park. Later he bought a second house in the area, into which he moved, while retaining ownership of the first. This entitled him to purchase a second membership share, which he did. After moving, Sullivan leased his old house to T. R. Freeman, Jr., a Negro. With the lease of the home he made a temporary assignment of his second membership share to Freeman, as provided in the by-laws. However, the Board of Directors refused to accept the assignment because of Freeman's race. Subsequent difficulties over the assignment resulted in Sullivan's expulsion from Little Hunting Park. On his own behalf and Freeman's, he then sued for reinstatement and to compel approval of the assignment.

The state trial court declined to scrutinize the reasons for Sullivan's expulsion because it regarded Little Hunting Park as a "private and social" club, and denied relief. The Supreme Court of Appeals of Virginia denied a writ of error. The Supreme Court reversed, holding that 42 U.S.C.A. §1982, which it had held in *Jones v. Alfred H. Mayer Co.*, *supra*, to forbid all private racial discrimination in the sale or lease

<sup>8</sup> Although it is not expressly stated, it is inferable from Little Hunting Park's organization and membership provisions that it was built by the same real estate developers who built the four subdivisions from which members were drawn, as an aid to the sale of homes. This has become a common practice in the development of residential subdivisions. See *Jones v. Alfred H. Mayer Co.*, *supra*, where the opinion of the Court of Appeals discloses that the defendants, developers of the Paddock Woods subdivision in which Jones sought to buy a home, had also formed the Paddock Country Club, a golf and tennis club intended for the use of the persons to whom they sold homes in the subdivision. 8 Cir., 379 F.2d 33, 35.

of real and personal property, applied to Sullivan's transfer to Freeman of the membership share as a part of the lease of his home.<sup>9</sup> It further held that the Board of Directors was forbidden to frustrate the transfer on racial grounds, and that a remedy was available to the aggrieved parties.

*Sullivan* thus decided affirmatively a question expressly reserved in *Jones* — whether an incident to a transaction in which the parties are protected from racial discrimination by §1982 is similarly protected.<sup>10</sup> However, it has no application to a transaction which is itself not within the protection of §1982 and is not a part of or an incident to such a transaction. Whether *Sullivan* outlaws any or all racial discrimination in Wheaton-Haven's membership and guest policies is to be determined not by the association's formal organization but by whether it is in fact an organization in which the acquisition of membership is an incident of a protected sale or lease of property.<sup>11</sup>

---

<sup>9</sup> "There has never been any doubt but that Freeman paid part of his \$129 monthly rental for the assignment of the membership share in Little Hunting Park. The transaction clearly fell within the 'lease.' \* \* \* Respondents' actions in refusing to approve the assignment of the membership share in this case was clearly an interference with Freeman's right to 'lease.'" *Sullivan v. Little Hunting Park, supra*, at 236-237, 90 S.Ct. at 404.

<sup>10</sup> See *Jones v. Alfred H. Mayer Co., supra*, n. 10 at 413-414, 88 S.Ct. 2186. *Sullivan* did not purport to decide the question with respect to some of the other "incidents" discussed in *Jones*, and the question may become moot now that the Open Housing Act of 1968 is in full effect.

<sup>11</sup> We need not consider any of the transactions covered by §1981 at this juncture. Manifestly, admission to membership in Wheaton-Haven is not incident to any contract other than the membership agreement itself, if it is not incident to a contract for the sale or lease of property.

Initially, it should be observed that the sort of transaction out of which the dispute in *Sullivan* arose, under no circumstances, could have arisen with respect to Wheaton-Haven. Unlike Little Hunting Park, Wheaton-Haven does not allow one person to own multiple memberships. Membership is by family units. An eligible family may have one membership, which entitles only family members and guests (relatives only, under its current rules) to use the pool. Thus a member of Wheaton-Haven cannot engage in the "business" of renting out his right to use Wheaton-Haven's facilities, as Sullivan did with his second share. Even if a member desired to rent his one membership share, giving up the right to use the pool himself, there is no way in which it can be done under the regulations of the association, for membership is, quite simply, nonnegotiable.<sup>12</sup>

That a membership cannot be leased does not, of course, end the inquiry. If it is transferred as an incident to a sale of property, the membership would be subject to the same requirement of non-discrimination that §1982 imposes on the major transaction. On this point the plaintiffs place their principal reliance. Under the by-laws, if a member of Wheaton-Haven who is a property-owner sells his home

---

<sup>12</sup> There is a provision in the by-laws which allows members who cannot use the pool to become inactive, in which event a number of "temporary memberships" not greater than the number of inactive memberships is authorized. However, temporary memberships are authorized to be offered to waiting applicants for full membership, and only in the order in which they appear on the waiting list. Thus, it is impossible for a member to become inactive in order to give another selected person temporary access to the pool. He has no control over the selection of the persons who will be offered a temporary membership, for it automatically goes to the first person on the waiting list. Additionally, the temporary membership provisions is effective only when the rolls are full, and this condition has never existed at Wheaton-Haven.

and resigns his membership,<sup>13</sup> his purchaser is entitled to a first option to become a member. The plaintiffs urge that this is merely a devious method of accomplishing the same result as was accomplished by direct transfer in *Sullivan*. Under other circumstances we might agree, but in this case we cannot. In the context of this case, the overall operations of Wheaton-Haven, and the positions of the parties, the option provision is so speculative and remote that it cannot be a realistic basis for a determination that there is a transfer of membership in Wheaton-Haven incident to a transaction in real or personal property.

A first option is not the equivalent of acceptance for membership, although in other circumstances it could be. The holder of a first option receives the right to have his application for membership considered without taking his place at the end of the waiting list. No other rights attach to the option. Because the effect of the option is solely to vault a resigning member's vendee over the heads of persons on the waiting list to receive immediate consideration for a newly vacated membership, it can operate only when the membership rolls are full, and a waiting list exists. Absent a full membership list, the new homeowner receives literally nothing, for his "option" entitles him only to what every other prospective member is entitled to — the right to be considered immediately for membership in an organization which has room for all present applicants. The value of a first option to acquire something which is immediately available in sufficient quantity to supply all who want it is nothing.

---

<sup>13</sup> A member is not required to resign in the event he sells his home. If he retains his membership, of course, no option is given to his purchaser.

Wheaton-Haven's membership rolls are not full and have never been. There are some sixty vacancies out of the authorized membership of 325, a situation which has obtained for several years. Thus, any eligible person, with or without an option, can have an application for membership considered without the necessity of working his way up through a waiting list. The first option, from the founding of Wheaton-Haven through the foreseeable future, is a thing utterly without use or value and, as such, is a functional nullity. It is far too tenuous a thread to support a conclusion that there is a transfer of membership incident to the purchase of property.<sup>14</sup> Significantly, the plaintiffs have never suggested that any person ever became a member of Wheaton-Haven in this manner, in sharp and marked contrast to the situation in *Sullivan*, where transfers and assignments incident to land sales were expressly provided for and appear to have occurred as a routine matter.

Finally,<sup>15</sup> plaintiffs argue that *Sullivan* controls this case because Wheaton-Haven draws members from an area so

---

<sup>14</sup> It is difficult to understand how the argument on this point would benefit the plaintiffs in any event. The person from whom Dr. Press purchased his home was not a member of Wheaton-Haven, and Dr. Press acquired nothing connected with Wheaton-Haven by his purchase. Were the situation presented where a Negro had purchased a home from a resigning member and been refused consideration for membership, we might have a different case. Here there is no transaction on the basis of which Dr. Press could have acquired a specific right which, were he white, would have carried with it some embryonic interest in Wheaton-Haven.

<sup>15</sup> The plaintiffs make one additional argument which is not strenuously urged. It is suggested that *Sullivan* holds that any organization which either makes use of land, so that a member might be said to

(continued)

geographically delimited that the purchase of a home in the area impliedly carries with it the right to membership in the pool. This argument is of much broader scope than the argument based on the first option provision. If correct, it means much more than that some individual memberships in Wheaton-Haven may be incident to sales of property, and, as such, subject to the purchaser's right to enjoy membership as incidental to them without interference by the other members. It would mean that the whole of Wheaton-Haven is an incident to home ownership in the area, as was the situation with the Paddock Country Club in *Jones v. Alfred H. Mayer Co.*, supra. From this it would follow that any person purchasing a home in the designated area would have a right to be considered for membership without regard to race.

The argument, however, mischaracterizes both Wheaton-Haven and Little Hunting Park in an attempt to make them appear functionally identical. The sources of members for the two organizations are markedly different. Although *Sullivan* did not expressly hold that Little Hunting Park would be required to admit any eligible person

---

<sup>15</sup> (continued) lease the property on which it carries out its functions, or which enters into contracts with its members, is not private. This argument turns *Sullivan* on its head. It is the fact of membership being incidental to the purchase or lease of property (or perhaps to the making of some other contract) which, *Sullivan* holds, brings a club, perhaps otherwise private, within the ambit of §1982 so as to protect the purchaser or lessee in his right to enjoy the membership incident to the property interest which he purchased or leased. That a club must use land in order to carry out its functions, or that it makes a "contract" of membership with everyone who joins, is irrelevant to the problem with which *Sullivan* dealt.



to membership without racial discrimination, it is reasonably inferable from the opinion, and we will assume here that a general requirement of non-discrimination in member selection is imposed by *Sullivan* on any organization which stands in the same relationship to the area from which it draws members as does Little Hunting Park to the area it serves.

Little Hunting Park drew members only from four named residential subdivisions. Some confusion is created by the fact, pointed out by the plaintiffs, that some of its members resided elsewhere. However, it should be noted that one need not reside in the named subdivisions in order to purchase a membership share in Little Hunting Park. One need only own property there.<sup>16</sup> In addition, it was possible for a person who had acquired membership through residence or ownership in one of the subdivisions to retain it after he moved away. These factors easily explain why Little Hunting Park had non-resident members. Membership was unequivocally tied to the land, whether one resided there or owned it.<sup>17</sup>

---

<sup>16</sup> It is precisely this feature of Little Hunting Park that renders it most suspect as an incident to sales in a commercially developed subdivision rather than a truly voluntary association. It encouraged the development of absentee landlords dealing commercially in membership shares, a situation which is impossible at Wheaton-Haven.

<sup>17</sup> The Board of Directors of Little Hunting Park was authorized to designate additional areas as sources of members, but counsel for plaintiffs, who represented the successful plaintiffs in *Sullivan* and has supplemented the record with a great deal of background information about that case and about Little Hunting Park in particular, has not suggested that any additional areas were so designated. It does not require a great leap to suppose that if an additional area should be named by the directors, it would undoubtedly be another subdivision opened by the same developers who had opened the original four.

Wheaton-Haven accepts as members persons who actually reside within an area described by a circle three quarters of a mile in radius with its center at the pool. On the recommendation of a member, and subject to a limit of thirty percent of the total membership, it will accept persons as members who live anywhere outside the three quarter mile circle.

Fundamental differences are at once apparent. Little Hunting Park appears to be characteristic of the sort of recreational facilities frequently installed in modern real estate developments, which are included by the developers to enhance their sales of individual properties, and which are "private" in the sense that they serve only those persons who purchase from the developers. The right to use the recreational facilities is incidental to, or part of, the rights acquired directly with the acquisition of possessory rights in a lot in one of the designated subdivisions.

The contrary is suggested by Wheaton-Haven's organization and structure, and confirmed by its history. Its benefits are not limited to those who deal commercially with a particular developer or group of them, and its members are not limited to, nor does it purport to serve all of, the "general public" in any recognizable community. There is an area preference, and nothing more, in the provision that not more than thirty per cent of the memberships may be awarded to persons who reside more than three quarters of a mile from the pool.

The difference between a real estate developer who builds recreational facilities, the use of which he restricts to those persons who purchase his home-sites, and a voluntarily associated group of neighborhood residents who, desiring to build one, and who, desiring that most of their

group should be reasonably near neighbors, set up a proportional preference for persons living near the facility, is one which goes to the very heart of the difference between public and private. The history of Wheaton-Haven's formation and development, noted briefly above, demonstrates that it is just such a voluntary and spontaneous organization. The District Court correctly found *Sullivan* inapplicable to such an organization.

### III

There remains the question whether Wheaton-Haven is a "private club or other establishment not in fact open to the public." Although the preceding discussion may suggest the answer, the point requires separate consideration, as there are additional factors which must be taken into account in order to make a full determination of the claim for exemption under the specific terms of the 1964 Act.

The cases under 42 U.S.C.A. §2000a(e) are now so numerous, and the standards applicable in determining a claim for exemption so often discussed, that it would serve no purpose to list those standards.<sup>18</sup> Considered in their light, Wheaton-Haven qualifies under the Act as a private club.

---

<sup>18</sup> See, e.g., *Daniel v. Paul*, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318; *NeSmith v. Y.M.C.A. of Raleigh, North Carolina*, 4 Cir., 397 F.2d 96; *U. S. v. Richberg*, 5 Cir., 398 F.2d 523; *Stout v. Y.M.C.A. of Bessemer, Alabama*, 5 Cir., 404 F.2d 687; *Wesley v. City of Savannah, S.D.Ga.*, 294 F.Supp. 698; *U.S. by Katzenbach v. Jack Sabin's Private Club*, E.D.La., 265 F.Supp. 90; *Williams v. Rescue Fire Co.*, D.Md., 254 F.Supp. 556.

Certain of its features are obvious indicators of its private nature. Its structure is that of a private association, though that is not of great weight, since it is relatively easy for a place of public accommodation to take on the formal features of a club without changing its nature. Unlike every organization which has ever been held to be a "sham" private club, Wheaton-Haven is owned, operated and controlled entirely by its membership. It was initially financed through the initiation fees of the first members, and new members must make a comparatively heavy investment of \$375 in order to join. The members of the Board of Directors are required to be club members. Regular membership meetings are held, and members participation is strikingly high.<sup>19</sup> Substantial annual dues are charged, and members are liable for further assessments if the dues are insufficient to meet annual expenses. Only members and their guests can use the pool. There is no way in which a non-member, by payment of an admission fee, can gain entrance. Nor does Wheaton-Haven publicly solicit members.<sup>20</sup>

---

<sup>19</sup> The exhibits filed by Montgomery County, which was allowed to participate as *amicus curiae* urging reversal, reveal that at one recent membership meeting there were 106 members present and voting. No figures were supplied for other meetings. The one in question was held at the time the guest limitation was adopted, and may or may not be typical.

<sup>20</sup> The pool engages in no advertising whatever. At the pool area there is a sign giving the telephone number of the membership chairman, but it is not disputed that this sign is so positioned that it can be seen only by the members and their guests who have already been admitted to the area.

Wheaton-Haven does not hold itself out in any way as serving the general public, whether that aggregate be considered from the standpoint of Maryland, Montgomery County, Silver Spring or the three quarter mile circle from which seventy per cent of the members are drawn. The membership limitation is such that even if the "general public" is regarded as including only the residents of the last, most severely delimited area, Wheaton-Haven has deliberately avoided any attempt or claim to serve the group as a whole.<sup>21</sup>

For purposes of federal and state taxation Wheaton-Haven is classified as other private clubs.<sup>22</sup> That it goes by a different name — community swimming pool — for

---

<sup>21</sup> Cf. *NeSmith v. Y.M.C.A. of Raleigh, North Carolina*, *supra*, in which the defendant offered membership to any person in the city of Raleigh, and in fact did have several thousand members.

Population figures are not included in the record. However, it is manifest that in a nearby suburb of Washington, D.C., a residential area including almost two square miles will have a number of residents exceeding by many times the number which Wheaton-Haven was designed to serve.

<sup>22</sup> The County contends that, as a community swimming pool, Wheaton-Haven is favored over private clubs by the state income tax laws. This contention finds no support in Maryland law. Wheaton-Haven's exemption from state income taxes is derived from Md. Code, Art. 81, §288(d) (8), specifically exempting community swimming pools. In the same section, §288(d) (5), religious, educational, charitable, social, fraternal and other similar corporations, a category which, so far as we can determine, includes almost every kind of private club, are granted the identical tax exemption.

zoning purposes is not relevant to our inquiry. The name is without significance. It serves merely to subject the organization to certain requirements relating to set-backs, provision of parking spaces, and financial responsibility because of the obvious capacity of such a facility to become a public nuisance if it is not regulated somewhat more closely than are organizations operating other kinds of facilities. That the state requires it to meet certain neutral conditions relating to health, safety or convenience in order to operate neither makes it a public facility nor involves the state in its membership policies.

The final test, and one of the more important ones, is the test of exclusivity. The test is an elusive one, because in many cases the membership requirements of a genuine private organization, though real, are not susceptible to precise definition. In essence, a private club is a voluntary and generally self-governing association of persons drawn together for the furtherance of a common goal. The common interest in a single activity or project is itself often the principal basis of selectivity, and many clubs require no other. Often the members of a club desire a broader range of commonality of interests than a single common interest, to the end that the members should be socially congenial. Where an organization exhibits no discernible basis of commonality other than a common desire to exclude persons of other races, it becomes difficult, if not impossible, to distinguish it from a place of public accommodation attempting to masquerade as a club. As is the case in any line-drawing exercise, the difficulty here lies in determining the nature of an organization which appears to be somewhere between the obviously public and the obviously private. Generally, the courts have looked for assistance in such cases to the



other distinguishing characteristics, discussed above, which mark an organization as public or private. In those respects Wheaton-Haven appears unmistakably private. Nevertheless, it lacks easily ascertainable standards for membership other than, obviously, an interest in swimming sufficiently great to impel a person to pay the very substantial fees and dues that membership entails.

That standards are not immediately and precisely ascertainable, however, does not mean that they do not exist. Some considerations of social and financial standing are implicit in the size of the fees and dues. There are selective elements other than race alone. Rejection of white applicants is, though rare, not unheard of. The record does not contain the reason for the rejection, but the application of one white man was rejected.<sup>23</sup> The parties did not address themselves to the point, but the County points out that interviews are conducted with prospective members, although it suggests that these interviews are not far-ranging.

---

<sup>23</sup> This low rejection rate is in connection with formal applications only. At oral argument we were told by counsel for the defendants that there have been numerous occasions in the past when a white prospective member would be rejected after an informal interview and not given an application for membership. This would not show on the club's records as a rejection, but it would have the same effect. This information is not in the record, but the plaintiffs have not suggested that it is an inaccurate representation. It is typical of the manner in which private clubs often screen prospective members. Very often the actual application for membership is strictly a formality, for the club's decision will have been already made.

Dr. Press, of course, was rejected in exactly this manner. Because he was never allowed to make a formal application for membership, he would not appear on Wheaton-Haven's books as having been rejected, despite the fact that we know he was.

In sum, although Wheaton-Haven's membership admittedly, is racially identifiable, it has been influenced by other criteria. Given the fact that its form of organization, its manner of operation, and its member activities are all characteristic of a bona fide private club rather than a place of public accommodation, and that it clearly meets the only express test set out by Congress — that it be "not in fact open to the public" — we cannot say that its inability to produce a detailed set of clear, precise and unmistakable standards for membership marks it as a covered establishment. From the standpoint of all the relevant factors taken as a whole, it has demonstrated that it is private, within the meaning of the federal statute.

A brief comment is in order concerning the participation in the case of Montgomery County. The County has enacted an anti-discrimination ordinance, which it has sought to have applied to Wheaton-Haven.<sup>24</sup> It sought leave to participate in the case in the belief that a decision favorable to Wheaton-Haven would preclude any effort on its part to have the local ordinance applied to it and similar organizations. The assumption, of course, is quite erroneous. Our decision here has no effect on state or local laws or their interpretation by state courts. The federal statute is unlike the county ordinance, and it is for the courts of Maryland alone to determine what objects the local law includes. Nor is there any pre-emptive

---

<sup>24</sup> Because the ordinance was enacted in executive rather than legislative session, a question has been raised as to its validity under the Maryland Constitution. That question, of course, will be finally resolved in the courts of Maryland and does not concern us.

effect on local attempts to eradicate racial discrimination at other levels than those reached by federal law.<sup>25</sup> The contrary is well established by the terms of the Civil Rights Act, 42 U.S.C.A. §2000a-6(b), and by previous decisions of the Supreme Court. *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84.

Affirmed.

BUTZNER, Circuit Judge (dissenting):

I would have granted the plaintiffs' motion for summary reversal because the judgment dismissing their claim is a marked departure from authoritative precedent construing those provisions of the Civil Rights Act of 1866 codified as 42 U.S.C. §1982 (1970).

The bylaws of the Wheaton-Haven Recreation Association, Inc. provide that membership "shall be open" to residents who live within three-quarters of a mile of the pool, subject to a stated maximum number of families and to approval of the association acting through its members or its board of directors. The bylaws also provide for Wheaton-Haven to repurchase the membership of a member who resigns and sells his home. In that event, the purchaser of the home shall have the first option to buy the membership of the seller from Wheaton-Haven, subject to the approval of the board.

---

<sup>25</sup> We recognize that, as Mr. Justice Harlan has pointed out, there may be constitutional questions concerning the attempted eradication of some very low levels of private discrimination. *Sullivan v. Little Hunting Park*, *supra*, dissenting opinion of Harlan, J., at 248, 90 S.Ct. 400.

Dr. and Mrs. Harry C. Press own a home in this neighborhood. It is undisputed that they were disqualified from membership for one reason — they are black. Had they been white persons, they could have purchased a membership in Wheaton-Haven. Membership would have afforded them not only a right to use the pool but, of greater significance to this case, it would have allowed them to sell to the eventual purchaser of their home an option to purchase their membership.

## I

The Civil Rights Act of 1866 provides in part:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. §1982.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409; 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), the Court applied the Act to bar racial discrimination in the sale of a house. The Court cautioned that "Negro citizens \* \* \* would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." 392 U.S. at 443, 88 S.Ct. at 2205.

*Jones v. Alfred H. Mayer Co.* establishes beyond doubt that Dr. and Mrs. Press have the same right enjoyed by their white neighbors to purchase, hold, sell, and convey real and personal property. They are entitled to no less. The sole question raised by this case, then, is whether membership in Wheaton-Haven is property within the meaning of §1982. I believe it is.

While the details differ, this case is indistinguishable in all material aspects from *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed. 2d 386 (1969). Under the bylaws of Little Hunting Park, membership in a swimming pool association was open to residents in an area of Fairfax County, Virginia, and a member could assign his membership to a tenant, subject to the approval of the board of directors. When a white member attempted to assign a membership to his tenant, the board of directors refused approval because the tenant was black. The trial court denied relief to the landlord and tenant on the ground that Little Hunting Park was a private social club. Finding "nothing of the kind," the Supreme Court reversed, saying: "There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race. \* \* \* It is not material whether the membership share be considered realty or personal property, as §1982 covers both." 396 U.S. at 236, 90 S.Ct. at 404. And the Court held that the transaction clearly fell within the right to "lease" protected by §1982. 396 U.S. at 237, 90 S.Ct. 400.

The points of distinction involving the nature of the property right considered in *Sullivan* and the nature of a Wheaton-Haven membership are not of controlling significance.



It is immaterial that a tenant claimed membership in Little Hunting Park under a lease, while Dr. and Mrs. Press base their claim on ownership of real property situated less than three-quarters of a mile from the pool. Section 1982 protects the rights to "purchase" and "hold" property no less than the right to "lease."

Nor does it matter that families who own no real estate can join Wheaton-Haven or that Dr. and Mrs. Press are seeking to acquire membership on the basis of owning a home instead of exercising an option. Under the bylaws membership is "open" to a white neighbor without the exercise of an option. Having obtained a membership, the neighbor can eventually sell an option for it along with his home in accordance with Wheaton-Haven's bylaws. Since membership in Wheaton-Haven is incident to the ownership of property, it is covered by §1982.

Similarly, I cannot accept Wheaton-Haven's argument that because the membership rolls are not presently filled the option has little or no value. Several years from now it may well be that a white neighbor can sell his home at a considerably higher price than Dr. and Mrs. Press because the white owner will be able to assure his purchaser of an option for membership in Wheaton-Haven. Dr. and Mrs. Press, however, are denied this advantage. Even though the present value of an option cannot be readily ascertained, a dollar in the hands of Dr. and Mrs. Press, in the language of *Jones v. Alfred H. Mayer Co.*, should be able to purchase at least the same thing as a dollar in the hands of their white neighbors. Section 1982 should not be construed to deny a bargain on the basis of race.

The vice of Wheaton-Haven's discriminatory practices is similar to Little Hunting Park's. In each case ownership



of real property by a white person carried with it the right to a transferable membership — a right denied to black persons. Little Hunting Park's transfer by assignment and Wheaton-Haven's use of an option differ only in form, not substance. The congressional commitment to equal rights under the law manifested by the enactment of the Civil Rights Act of 1866 cannot be served by viewing this case as a simple exercise in the fine art of conveyancing. The case involves far more. It is an attempt to secure what the proponents of the Act envisioned and the Supreme Court has preserved — the "great fundamental rights" of "all men, whatever their race or color" to "acquire" and "dispose" of property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).

## II

I doubt the pertinency of the claim that the Civil Rights Act of 1866 is circumscribed or limited by the Civil Rights Act of 1964.<sup>1</sup> This is an inappropriate case to consider whether private clubs are excluded from the Civil Rights Act of 1866. The plaintiffs make no claim for admission to a private club. Instead they contend correctly, I believe, that Wheaton-Haven is not a private club.

To maintain its claim of privacy, Wheaton-Haven points to its rejection of one white applicant since 1958, and its counsel in oral argument asserted that other persons had

---

<sup>1</sup> Similar arguments have been made and rejected. *E.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969); *cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-17, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1100 (5th Cir. 1970).

been informally rejected. But the record and counsel's excursion outside it do not establish that any homeowner living within three-quarters of a mile of the pool was denied membership or that any person acquiring an option with his purchase of a house was turned away.<sup>2</sup>

It is difficult to believe that a club is private when its membership is so closely tied to real estate bought and sold on the open market. *Sullivan v. Little Hunting Park* holds that in a similar context the test of a private club is whether there is "a plan or purpose of exclusiveness." 396 U.S. at 236, 90 S.Ct. at 404. Here there is none save race. As far as this record shows, Wheaton-Haven's bylaws mean just what they say: membership is "open" to residents within a specified geographic area and membership can be transferred to the purchaser of a member's house. It is immaterial that membership initially and by transfer is subject to the approval of the corporation either through its members or its board of directors. The bylaws of Little Hunting Park also subjected assignment of membership to approval of the board of directors. But as *Sullivan* teaches, §1982 prohibits the board from withholding approval because of race. 396 U.S. 236.

Wheaton-Haven emphasizes that Little Hunting Park had aspects of commercialism that it lacks. The record before us does not support this conclusion, but even if it did, it would be irrelevant. *Sullivan* did not turn on this point.

---

<sup>2</sup> Of course, Wheaton-Haven could refuse membership to any number of persons, black or white, who lived within or without the geographic area designated by its bylaws, without infringing rights secured by §1982 if refusal were not based on race.

The test is not whether the organizers were commercially motivated, but whether there is presently a "plan or purpose of exclusiveness" with respect to membership, 396 U.S. at 236, 90 S.Ct. 400.

### III

Mr. and Mrs. Murray Tillman are white members of the association who brought a black guest, Mrs. Grace Rosner to the pool. Her visit provoked a change in the bylaws; guest were limited to relatives of members — all of whom are white. Unquestionably Wheaton-Haven can limit the number of guests a member can bring. Similarly, it can refuse to admit guests, regardless of race, who because of their demeanor or age would unduly burden the use of the pool. But otherwise valid limitations cannot be couched directly or indirectly to restrict the race of guests. The Tillman membership is a valuable property right, an incident of which is the right to invite guests. The right would be empty indeed unless the guests have the right to accept. Racial restrictions on the right to invite guests, and to accept invitations, are racial restrictions on the right to hold property that violate §1982. A white host can vindicate this right. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969). Cf. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

I would reverse the judgment, enter summary judgment for the plaintiffs, and remand for further proceedings consistent with this opinion.

**ON PETITION FOR REHEARING  
PER CURIAM:**

In the petition for rehearing the Court's attention was invited to the answer to an interrogatory indicating that the membership list of Wheaton-Haven Recreation Association was full in the spring of 1968 when Dr. Press first became interested in considering a possible application for membership. That answer seems to be contradicted by an answer to another interrogatory reporting the admission of three new members before any intervening resignation, but finds general support in a deposition of a member of Wheaton-Haven's board who championed the cause of the admission of Dr. Press.

The briefs, the appendices, and the findings of the district court all seemed to warrant the statement in the opinion that the membership list had never been full. That inadvertent misstatement is now corrected to reflect a full membership list in the spring of 1968. The result is unaffected, however, for it is clear that the membership did drop off thereafter, that Dr. Press would have been admitted without delay except for the fact that his submission of a formal application was foreclosed by the resolution adopted by the members in the fall of 1968, and that there has been no waiting list since then. The situation with respect to the presence or absence of vacancies in the membership list has relevance only prospectively from the date of that meeting of the membership.

The petition for rehearing and the suggestion for rehearing en banc having been considered, the court having been polled and less than a majority of the panel having voted for a rehearing and less than a majority of the court having voted for a rehearing en banc, the petition for rehearing and the suggestion for rehearing en banc are both denied.

**WINTER and CRAVEN, Circuit Judges, dissenting:**

**We dissent from the denial of rehearing en banc.**

For the reasons expressed by Judge Butzner, the dissenting member of the panel which decided the case, we think the instant case is indistinguishable from *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 299, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), and plaintiffs are entitled to judgment on its authority.

Even if our reading of *Little Hunting Park* is erroneous, we deplore the majority's arriving at the dubious holding that the Civil Rights Act of 1866 was impliedly repealed in part by the Civil Rights Act of 1964 when that question has been neither briefed nor argued. A holding of that importance and scope — and one apparently in conflict with the decisions of other courts that have considered the question — should be reached if not by the court sitting en banc, then at least by the panel hearing the case, only after full adversary treatment by the parties.





## **APPENDIX C**

**[Filed July 8, 1970]**

**Allison W. Brown, Jr., Washington, D.C., and Raymond W. Russell, Rockville, Maryland, for plaintiffs.**

**Henry J. Noyes, of Rockville, Maryland, for all defendants except Richard E. McIntyre.**

**John H. Mudd and H. Thomas Howell, both of Baltimore, Maryland, for defendant Richard E. McIntyre.**

**Northrop, District Judge.**

**This is an action by a Negro homeowner to obtain membership in a private swimming pool and by a white member of the pool and that white member's Negro guest to have the community pool's policy of not permitting Negro guests declared a violation of the laws or Constitution of the United States. The Wheaton-Haven Recreation Association, Inc., a non-profit Maryland corporation which owns and operates the pool, and individuals who are directors of the corporation are the defendants. The defendants have filed a motion for judgment on the pleadings which the court under rule 12c will treat as a motion for summary judgment and the plaintiffs have filed a motion for summary judgment. There is no dispute as to the facts which are admitted in the pleadings or stipulated.**

**Wheaton-Haven Recreation Association was set up in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Maryland. The pool, constructed in the 1958-59 season, was financed by subscriptions for membership collected from persons residing in the area. The pool presently charges a \$375 initiation fee and annual**

dues of \$50-\$60. As set out in the bylaws of the corporation, membership is open to "bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool." Defendants' exhibit 1 to complaint (Bylaws art. III, sec. 1). Members may be taken from outside the three-quarter mile radius upon the recommendation of a member as long as the percentage of members from outside the area does not exceed 30 percent. In either event, applicants for membership must be approved by "an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose." Defendants' exhibit 1 (Bylaws art III, sec. 3). Membership, which is by family units rather than simply individually, was limited to 325 family units, but at no relevant time has the membership been filled, so that in effect membership is not limited to the geographic area. In the event a member sells his property, the purchaser has an option to purchase the seller's membership in the pool; but the procedure set out is for the seller to resign and the buyer to apply for membership, the application being subject to the approval of the Board of Directors. Defendants' exhibit 1 to complaint (Bylaws art. VI). Negro families do reside within the three-quarter mile area; and, while none of those families are members of the pool, there is no indication that any of them, other than the plaintiff Press, has applied for membership. Wheaton-Haven records reveal that, prior to the application involved herein, only one application, that of a white man, has been rejected by the association in its eleven-year history.

Only members and their guests are admitted to the pool. Unlike the situation common in other cases involving swimming pools or recreation areas, the public is not admitted

to the Wheaton-Haven facility upon the payment of an entrance fee, frequently denominated in those other cases as a "membership fee."

Dr. and Mrs. Harry C. Press, two of the Negro plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of the pool and, therefore, had no interest in the pool which he could transfer. In the spring of 1968, however, Dr. Press sought to obtain an application for membership in the pool from members of the pool's Board of Directors. Wheaton-Haven refused to furnish him with an application. The stipulated reason for not sending him an application was that Dr. Press is a Negro.

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. Around July 19, 1968, the Tillmans brought Mrs. Grace Rosner, a Negro woman, to the pool as a guest. On July 20, 1968, Wheaton-Haven promulgated a rule that limited guests to relatives of members. On July 24, 1968, and at all times since that date, Wheaton-Haven has refused to permit the Tillmans to bring Mrs. Rosner to the pool as a guest. The limitation on guests, while perhaps precipitated by the admission of Mrs. Rosner on July 19, was intended to keep down the burgeoning number of guests.

The Wheaton-Haven pool was constructed in 1958-59 by Gillespie & Co., a Falls Church, Virginia, contractor. Present operations of the pool entail the use of pumps, a motor, and a chlorine feeder manufactured outside the State of Maryland and snack vending machines. All these facilities are in an enclosed area available only to members and their guests.

Construction of the pool facility was done pursuant to a "special exception" under the zoning ordinance of the

Montgomery County (Maryland) Code granted by the Montgomery County Board of Appeals. Under Maryland law, a "special exception" is a use permitted if certain prerequisites detailed by the legislative body are met; thus granting such an "exception" is not a discretionary act by the zoning board and a "special exception" is to be distinguished from a "variance." *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 262 A.2d 499 (1970); *Montgomery County v. Merlands Club, Inc.*, 202 Md. 279, 96 A.2d 261 (1953); Carson, Reclassifications, Variances, and Special Exceptions in Maryland, 21 Md. L. Rev. 306, 314-15 (1961). For example, prior to granting a special exception, the zoning authority required Wheaton-Haven to demonstrate its financial responsibility by submitting evidence that 60 percent of its projected construction costs were obligated or subscribed.

Wheaton-Haven does pay state and local real estate taxes, but is exempt from state and federal income taxes under section 288(d)(8) of article 81 of the Maryland Code and section 501(c)(7) of the Internal Revenue Code exempting non-profit, member-owned and controlled recreational facilities.

### PLAINTIFF'S CONTENTIONS

Plaintiffs claim that defendants' racially discriminatory conduct violates their rights under 42 U.S.C. sections 1981, 1982, and 2000. The relevant portions of 42 U.S.C. sections 1981 and 1982 are as follows:

Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

**Section 1982.** All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Plaintiffs claim that Dr. Press sought either to enter into a contract for the purchase of a pool membership or to purchase personal property, namely a pool membership, under circumstances in which white citizens could obtain such membership, but that Dr. Press was, contrary to section 1981 or 1982, denied that opportunity solely because of his race. Plaintiffs claim that the Tillmans' membership in the pool is either a contract or property interest and that, under *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969), they may sue under section 1982 for racially discriminatory conduct which is directed towards them for their associations with those of the black race and which interferes with their contract or property right. Finally, plaintiffs claim that Mrs. Rosner is either the third-party beneficiary of the Tillman's contract with Wheaton-Haven or the owner of a license or implied easement of ingress and egress and that the pool's racially restrictive guest policy denies Mrs. Rosner's right to acquire and enjoy those interests. They rely upon *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), and *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970).

Under 42 U.S.C. section 2000a, a person is entitled to be free of racial discrimination in the use and enjoyment of "any place of public accommodation," defined to include any "place of entertainment" in subsection (b), as long as either state action or an effect on interstate commerce is involved. Plaintiffs claim that, under *Daniel v. Paul*, 395 U.S. 298 (1969), a "place of entertainment"



includes a recreational area in which the patron is an active participant and not merely a passive spectator, and that the construction of the pool in Maryland by a Virginia contractor and the presence on the premises of equipment necessary for the functioning of the pool and manufactured outside Maryland establish the effect on commerce.

#### 42 U.S.C. SECTION 2000a AS A BASIS FOR RELIEF

Under 42 U.S.C. Section 2000a(e), a "private club" is exempt from the provisions of 42 U.S.C. Section 2000a and, therefore, may discriminate on the basis of race. That subsection provides as follows:

The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

Therefore, if Wheaton-Haven is in fact a private club, then its admitted discrimination against the Presses and Mrs. Rosner is not a violation of 42 U.S.C. Section 2000a.

The undisputed facts show that Wheaton-Haven is a member-owned and controlled, non-profits recreational facility. Its membership is not confined to a particular geographic area. Membership applications are subject to the approval of the Board of Directors or to the approval of the membership itself. The discretion to reject application has, one on previous occasion, been exercised to exclude a white applicant. Members pay a substantial membership fee of \$375 and yearly dues of \$50 to \$60. Membership is limited to 325 family units.



In *Nesmith v. Young Men's Christian Ass'n*, 397 F.2d 96, 101-02 (4th Cir. 1968), the Fourth Circuit indicated the following:

In determining whether an establishment is in fact a private club, there is no single test. A number of variables must be examined in the light of the Act's clear purpose of protecting only "the genuine privacy of private clubs . . . whose membership is genuinely selective . . . ." . . . The first factor is the size of the organization and the open-ended character of its membership rolls. Most private clubs have limited membership . . . and easily articulated general admission standards. . . . As one commentator observed, "Where there is a large membership or a policy of admission without any kind of investigation of the applicant, the logical conclusion is that membership is not selective . . . ."

\* \* \*

. . . "[S]erving or offering to serve all the members of the white population within a defined geographical area is certainly inconsistent with the nature of a truly private club."

In *Daniel v. Paul*, 395 U.S. 298, 301 (1969), the Supreme Court concurred in the lower courts' conclusion that a recreation area operated for profit and lacking "the attributes of self-government and member-ownership traditionally associated with private clubs" was not a private club within the meaning of 42 U.S.C. Section 2000a(e). Similarly, where membership in a swimming pool "club" cost twenty-five cents for admission, virtually no applicants

for membership other than the Negro plaintiff had been denied membership, and the membership did not participate in club decisions, this court concluded that the "club" operation was "an obvious subterfuge." *Williams v. Rescue Fire Co.*, 254 F. Supp. 556, 563 (Northrop, J.) (D. Md. 1966). The fact that the membership had no practicable way to change the racially discriminatory policies of Kenwood Golf and Country Club was an element in this court's recent conclusion that that club was not a "private club" within the meaning of 42 U.S.C. Section 2000a(e). *Bell v. Kenwood Golf & Country Club, Inc.*, Civ. No. 20568 (Thomsen, J.) (D. Md. May 13, 1970).

Applying those criteria to Wheaton-Haven, first, Wheaton-Haven has limited membership; no more than 325 family units may be members at one time. Membership rolls are not "open-ended." Second, members do control the association's operation through elected directors. Members or their elected directors approve membership applications. Admittedly the standard by which they determine eligibility for membership is not set forth in corporation's charter or bylaws or in any Board of Directors' resolution; but, since that is the common practice of all clubs, the absence of such an articulated standard does not imply that the only standard is racial. In fact, the only other instance of disapproval of an application involved a white applicant. Third, Wheaton-Haven is member-owned; each member puts up a \$375 initiation fee and pays \$50 to \$60 annual dues to finance the operations of the club, and the members are subject to an additional assessment if the expenses of operation exceed the total annual dues. Wheaton-Haven is not an ordinary business corporation, operated for the profit of a narrowly limited business group. It was not established to promote real estate sales in the area. It is a non-profit corporation operated to provide members

with swimming facilities. Fourth, Wheaton-Haven does not run afoul of the language in *Nesmith v. Young Men's Christian Ass'n* condemning clubs serving all white members within a geographic area. While Wheaton-Haven's charter does create a priority on accepting the applications of persons who reside within three-quarters of a mile from the pool, members are in fact drawn from outside that area. Finally, it should be reiterated that the facilities of Wheaton-Haven are available exclusively to those admitted to the confines of the pool area; neither the pool nor the snack vending machines are open to the public at large.

Therefore, this court concludes that Wheaton-Haven is a "private club" within the meaning of 42 U.S.C. Section 2000a(e) and may engage in the admitted exclusion of Negro members and guests solely on racial grounds.

#### 42 U.S.C. SECTIONS 1981 AND 1982 AS BASES FOR RELIEF

Plaintiffs contend that *Sullivan v. Little Hunting Park, Inc.*, 90 S.Ct. 400 (1969), controls the result in this case. In *Sullivan*, a Virginia nonstock corporation was organized to operate a community park and playground facility. Membership shares, which entitled one's immediate family to use the corporation's recreation facilities, could be assigned to the purchaser or lessee of a member. The assignment was, however, subject to the approval of the corporation's Board of Directors. Sullivan, a member, rented his home to Freeman, a Negro, and sought to assign his membership share to Freeman. The Board of Directors refused to approve the assignment. The Virginia trial court denied Sullivan and Freeman relief on the ground that Little Hunting Park was a private social club.

Finding "nothing of the kind on this record," the Supreme Court reversed, stating at 90 S.Ct. 404:

There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race. . . . What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, by reason of the Fourteenth Amendment.

In concluding that Little Hunting Park's refusal to permit the transfer of membership interfered with Freeman's right to "lease" under 42 U.S.C. Section 1982, however, the Court noted that "[t]here has never been any doubt but that Freeman paid part of his \$129 monthly rental for the assignment of the membership share in Little Hunting Park." 90 S.Ct. at 404.

This court has already concluded that Wheaton-Haven is a "private club" within the meaning of 42 U.S.C. Section 2000a(e) and, therefore, permitted to discriminate racially. It would be anomalous indeed to hold that Wheaton-Haven could so discriminate under the Civil Rights Act of 1964, but could not do so under the 1866 Act. A reasonable attempt to effect the Congressional purposes underlying each requires that this court construe the provisions of each consistently. The determination that Wheaton-Haven's discrimination is permitted under the 1964 Act which explicitly deals with such a factual situation should preclude a determination that the same conduct violates the less explicitly applicable principles of Section 1981 and Section 1982. However, this court,

repeating many of the factors outlined in its discussion of the private club exemption of 42 U.S.C. Section 2000a(e), directs its attention to the factors pointed out by the Supreme Court in concluding that Little Hunting Park could not discriminate against Freeman under 42 U.S.C. Section 1982.

First, Sullivan had the right to assign his membership to either the purchaser or the lessee of his property, subject to the approval of the Board of Directors. In contrast, a homeowner who is a member of Wheaton-Haven cannot transfer his membership to his purchaser. The seller's membership (if he has one) is sold back to Wheaton-Haven and the purchaser may apply for membership and have his application considered by the Board of Directors or membership of Wheaton-Haven. And more importantly in this case, Dr. Press' seller had no membership in the pool. Second, the Supreme Court observed that there was no plan of exclusiveness in Little Hunting Park; it was open to all white people in the area. Applications for membership in Wheaton-Haven must be scrutinized either by the Board of Directors or by the membership as a whole. While the criteria for acceptance is not formally set out, at least one white applicant has been denied membership. Third, Little Hunting Park, the Supreme Court concluded, was open to every white person within a given geographic area, there being no other selective element other than race. With Wheaton-Haven, while some priority is given to those applicants who resided within three-quarters of a mile from the pool, the 325 membership limit has never been fully filled, so that members may and do in fact apply from outside the geographic priority area. Fourth, the Supreme Court concluded that board approval of membership transfers was a device "functionally comparable to a racially restrictive



covenant." This court cannot conclude that Wheaton-Haven is such a "device." Membership in the pool is not tied to ownership or tenancy in the land. The pool is not a service or facility to the community as a whole. No purchaser or lessee of property within the three-quarter mile area had any *right* to belong to Wheaton-Haven, nor has his seller or lessor any right to assign his membership to anyone to whom he might transfer an interest in his property. Consequently, there is not even an "expectancy" which would affect the price of any property interest one might acquire either white or Negro, because there are no indicia of pool membership connected with the purchase or leasing of a home. On the basis of these distinctions, this court does not feel bound by the result in *Sullivan v. Little Hunting Park*. Instead, this court concludes that Wheaton-Haven is a "private club" and that membership in it was not an incident of Dr. Press' purchase of a home in the vicinity of the pool such as to be considered a property right within the meaning of 42 U.S.C. Section 1982. Similarly, this court concludes that the refusal of Wheaton-Haven, a private club, to entertain Dr. Press' application for membership does not deny Dr. Press' right to make and enforce contracts under 42 U.S.C. Section 1981.

As to the Tillmans and Mrs. Rosner, this court concludes that, Wheaton-Haven being a private club and, therefore, permitted by "public law" set out in 42 U.S.C. Sections 1981-82 and Section 2000a to engage in discriminatory conduct, members of Wheaton-Haven are bound by the contractual provisions and corporate decisions, *i.e.*, "private law," concerning members. The Tillmans must abide by the Board of Directors' decision to limit guests to relatives of members, even if one of the purposes of the limitation is to exclude Negro guests. Mrs. Rosner's right as a third-party beneficiary of the membership contract



can rise no higher than those of the Tillmans, so she also is bound by the guest policy of the club. Similarly, this court concludes that Mrs. Rosner's reliance on *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), is inappropriate, since this court has concluded that Wheaton-Haven, unlike Timberlake in *Scott v. Young* or Lake Nixon in *Daniel v. Paul*, is a private club. Therefore, Mrs. Rosner's claim of a right to purchase an easement of ingress and egress or her right to contract with Wheaton-Haven for admission as a guest, like Dr. Press' right, fails under either Section 1981 or 1982.

Therefore, defendant's motion for summary judgment is hereby, granted.

/s/ Edward Northrop  
United States District Judge

---



## APPENDIX D

### ORDER

Upon consideration of the petition for rehearing and of the suggestion for rehearing en banc, the court having been polled and less than a majority of the panel having voted for a rehearing and less than a majority of the court having voted for a rehearing en banc,

IT IS NOW ORDERED that the petition for rehearing and the suggestion for rehearing en banc be, and they hereby are, denied.

For The Court:

/s/ Clement F. Haynsworth  
Chief Judge, Fourth Circuit

A True Copy, Teste:

Samuel W. Phillips, Clerk

By Frances S. Sewell

Deputy Clerk

---

# INDEX

	Page
Lower Court Opinions .....	1
Jurisdiction .....	2
Amicus Curiae Authority .....	2
Question Presented .....	2
Statute Involved .....	3
Statement .....	6
Reasons for Granting a Writ of Certiorari .....	12
Summary of Argument .....	15
Argument:	
The District Court and the U. S. Court of Appeals erred in holding Wheaton-Haven Recreation Asso- tion, Inc. to be a private club .....	15
Conclusion .....	30

## CITATIONS

### Cases:

<i>Hill v. Kenwood Golf and Country Club, Inc.</i> , 312 F. Supp. 753 (D. Md. 1970) .....	19, 20, 23, 24
<i>Castle Hill Beach Club v. Arbury, N. Y.</i> , 2 N.Y. 2d 596, 162 N.Y.S. 2d 1, 142 N.E. 2d 186 (1957) .....	20, 21
<i>Crover Hill Swimming Club v. Goldsboro</i> , 47 N.J. 25, 219 A. 2d 161 (1966) .....	20, 21, 28, 29
<i>Doniel v. Paul</i> , 395 U.S. 298 (1969) .....	18, 22
<i>Eger v. Stone</i> , 253 Md. 533, 253 A. 2d 372 (1969) .....	7
<i>Hoops v. Cobb</i> , 185 Md. 372, 45 A. 2d 73 (1946) .....	7
<i>Maryland, Use of Gliedman v. Capital Airlines</i> , 267 F. Supp. 298 (D. Md., 1967) .....	14
<i>Miller v. Amusement Enterprises, Inc.</i> , 394 F. 2d 342 (5th Cir., 1968) .....	18
<i>Montgomery County Citizens' League v. Greenhalgh</i> , 253 Md. 151, 252 A. 2d 242 (1969) .....	7, 12, 17
<i>Wesmith v. Young Men's Christian Ass'n of Raleigh</i> , N. C., 397 F. 2d 96 (4th Cir., 1968) .....	18, 19, 20, 21, 25, 27, 28
<i>Pat Perusse Realty v. Lingo</i> , 249 Md. 33, 238 A. 2d 100 (1968) .....	14
<i>Scott v. Young</i> , 421 F. 2d 143 (4th Cir., 1970), Cert. Denied, 398 U.S. 929 (1970) .....	20

	Page
<i>Stout v. Young Men's Christian Ass'n of Bessemer, Alabama</i> , 404 F. 2d 687 (5th Cir., 1968) .....	20, 21, 28
<i>Sullivan v. Little Hunting Park</i> , 396 U.S. 229 (1969) .....	2, 20, 25, 27, 29
<i>Tauber v. County Board of Appeals</i> , 257 Md. 202, 262 A. 2d 513 (1970) .....	17
<i>Tillman, et al. v. Wheaton-Haven Recreation Association, Inc.</i> , 451 F. 2d 211 (4th Cir., 1971) .....	1
<i>United States v. Clarksdale King &amp; Anderson Co.</i> , 288 F. Supp. 792 (N.D. Miss., 1965) .....	20, 21, 25, 28
<i>United States v. Jordan</i> , 302 F. Supp. 370 (E.D. La., 1969) .....	19, 20, 21, 25, 29
<i>United States v. Richberg</i> , 398 F. 2d 523 (5th Cir. 1968) .....	18, 20, 21, 22, 25, 30
<i>Williams v. Rescue Fire Company</i> , 254 F. Supp. 556 (D. Md. 1966) .....	20, 21, 28, 29

## STATUTES:

Annotated Code of Maryland, Art. 25A (1966 Replacement Volume) .....	2
Annotated Code of Maryland, Art. 81, Sec. 288(d)(8) (1969 Replacement Volume) .....	11, 16
Charter of Montgomery County, Maryland, Art. 2, Sec. 213 .....	2
Civil Rights Act of 1964, 78 Stat. 243 (1964), 42 U.S.C. 2000a (1970) .....	2, 3, 4, 5, 6, 13, 15, 18, 30
Civil Rights Act of 1866, 42 U.S.C., Secs. 1981 and 1982 .....	6
Constitution of Maryland, Art. XI-A .....	2
Internal Revenue Code, Sec. 501(c)(7) .....	11
Section 77-1 et seq., Montgomery County Code 1965, as amended by Chap. 18, Laws of Montgomery County 1968 and Chap. 33, Laws of Montgomery County 1969 .....	12, 17
Section 111-37n, Montgomery County Code 1965 .....	16
Section 111-37z-4, Montgomery County Code 1965 .....	10, 16

## MISCELLANEOUS:

Rule 42(4) of the Rules of the Supreme Court of the United States .....	2
<i>Tillman, et al. v. Wheaton-Haven Recreation Association, Inc.</i> , Montgomery County (Md.) Commission on Human Relations, No. P.A.-6, June 3, 1969 ...	7
1 Race Rel. L. Survey 231 (Jan. 1970) (Vanderbilt Univ. School of Law) .....	7

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

---

No. 71-1136

---

**MURRAY TILLMAN, ET AL.,** *Petitioners*

**v.**

**WHEATON-HAVEN RECREATION ASSOCIATION, INC.,**  
**ET AL.,** *Respondents*

---

**Amicus Curiae Brief in Support of Petition for  
Writ of Certiorari**

---

**AMICUS CURIAE BRIEF**

---

**LOWER COURT OPINIONS**

The opinion of the U.S. Court of Appeals is reported as *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 451 F. 2d 1211 (4th Cir. 1971), and a copy of this opinion is reproduced as Appendix B to the Petition for Writ of Certiorari. The opinion of the District Court is unreported, but a copy of this opinion is reproduced as Appendix C to the Petition for Writ of Certiorari.



## JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). The judgment of the U.S. Court of Appeals was entered on October 27, 1971. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was duly filed, but was denied by the U.S. Court of Appeals on December 16, 1971 (App. D of the Petition for Writ of Certiorari).

## AMICUS CURIAE AUTHORITY

Authority to participate in these proceedings is founded on Rule 42(4) of the Rules of the Supreme Court of the United States. Montgomery County, Maryland, is a political subdivision of the State of Maryland, and the counsel under whose name this Brief is filed are the law officers of Montgomery County in whom participation is authorized. Article XI-A of the Constitution of Maryland; Article 25A of the Annotated Code of Maryland (1957 Edition) (1966 Replacement Volume); Article 2, Section 213 of the Charter of Montgomery County, Maryland.

## QUESTION PRESENTED

Whether the U.S. Court of Appeals erred in holding a community recreation association to be a private club and, hence, exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C., Secs. 1981, 1982 and 42 U.S.C., Sec. 2000a), despite the fact that this Court in a previous case (*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969)) held that an association with virtually identical characteristics

could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.<sup>1</sup>

### STATUTE INVOLVED

The statutory provision involved is Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a).

Section 2000a provides:

“(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent

<sup>1</sup> Because the particular interest of Montgomery County in the decisions of the lower courts does not involve a question based on an application or interpretation of Sections 1981 and 1982 of Title 42 of the United States Code, these laws are not considered in this Brief. Only Section 2000a of Title 42 of the United States Code is involved in this Brief.

or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Operations affecting commerce; criteria; "commerce" defined

(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or

there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

#### Support by State action

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by Officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

#### Private establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

**STATEMENT<sup>1</sup>**

The Plaintiffs-Appellants instituted suit in Federal District Court (Civil Action No. 21294), Maryland District, against the Defendants-Appellees for violation of the Civil Rights Act of 1866 (42 U.S.C., Secs. 1981 and 1982) and Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a). The Defendants-Appellees are Wheaton-Haven Recreation Association, Inc. (herein "Wheaton-Haven" or "Association") and thirteen individuals who were officers and directors of Wheaton-Haven at times material herein. The case was heard on cross Motions for Summary Judgment, as well as Plaintiffs'-Appellants' Motion for Preliminary Injunction. On July 8, 1970, the District Court rendered a verdict in favor of the Defendants. In ruling in favor of the Defendants, the District Court (Northrop, D.J.) found that the swimming pool facility here in question was operated as a private club and, therefore, no violation of the aforementioned Federal laws existed. The Plaintiffs-Appellants appealed to the U.S. Court of Appeals for the 4th Circuit (Case No. 14957). The Court of Appeals (Haynsworth, Boreman, Butzner, J.J.) affirmed the judgment of the District Court with one judge dissenting. On Petition for Rehearing, rehearing was denied, and Judges Winter and Craven joined in the dissent. The Plaintiffs-Appellants (herein Petitioners) have sought relief from that affirmance by filing a Petition for Writ of Certiorari to this Court.

---

<sup>1</sup> The facts set forth below are based upon the District Court's findings, as modified by the Court of Appeals, with certain additional comments by Montgomery County, Maryland, as indicated in footnotes.



The Federal suit was instituted after the Montgomery County Commission on Human Relations, through its Panel on Public Accommodations, declared Defendant-Appellee, Wheaton-Haven Recreation Association, Inc. to be a public accommodation under County law and not entitled to an exemption as "distinctly private in nature." *Tillman, et al. v. Wheaton-Haven Recreation Association, Inc.*, Montgomery County, Maryland Commission on Human Relations, No. P.A. 6, June 3, 1969; See 1 Race Rel., L. Survey 231 (1970) (Vanderbilt Univ. School of Law). Enforcement of a Commission cease and desist order is presently awaiting Maryland State Court action.<sup>3</sup>

Wheaton-Haven, a non-profit Maryland corporation, was created in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Montgomery county, Maryland.<sup>4</sup> The pool, constructed in the 1958-59 season, was financed by subscriptions for membership collected from persons residing in the

<sup>3</sup> The Panel's "Opinion, Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order" are reproduced herein as Appendix B. The County requested the Court of Appeals to take judicial notice of this document. The document is an administrative decision rendered by a governmental agency pursuant to the laws of Montgomery County as implementing the full and plenary police powers of the State of Maryland. *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 252 A. 2d 242 (1969). Such an administrative decision is entitled to a presumption of validity and full probative value. *Eger v. Stone*, 253 Md. 533, 253 A. 2d 372 (1969); *Heaps v. Cobb*, 185 Md. 372, 45 A. 2d 73 (1946).

<sup>4</sup> On September 23, 1958, Wheaton-Haven secured a special zoning exception as a "community swimming pool" as distinguished from a special exception for a "private club".



area.<sup>5</sup> The pool presently charges a \$375 initiation fee and annual dues of \$50-\$60. As set out in the bylaws of the corporation, membership is open to bona fide residents of the area within a three-quarter mile radius of the pool. Members may be taken from the general public outside the three-quarter mile radius upon the recommendation of a member as long as the percentage of members from outside the area does not exceed 30 percent of the membership.<sup>6</sup> In either event, applicants for membership must be approved by an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose. Membership, which is by family units rather than simply individually, is limited to 325 family units, but at no relevant time has the membership been filled so that in effect membership is not limited to the geographic area. In the event a member sells his property, the purchaser has the first option to purchase the seller's membership in the pool; but the procedure set out is for the seller to resign and the buyer to apply for membership, the application being subject to the approval of the Board of Directors. Negro families do reside within the three-quarter mile

---

<sup>5</sup> The membership solicitation was found to be active, open and unqualified. Circulars and government facilities were used to effect solicitation of membership. No Negroes lived in the area at the time and, therefore, no membership qualifications were employed or interviews conducted. A large sign was posted at the pool site to attract new members. Panel Findings Nos. 7, 12 and 17, App. 13a-15a.

<sup>6</sup> There is no evidence of record as to what portion of this 30 percent actually constitutes non-residents of the area.

area;<sup>7</sup> and, while none of those families are members of the pool, there is no indication that any of them, other than the Plaintiff Press, has applied for membership. Wheaton-Haven records reveal that, prior to the application involved herein, only one application, that of a white man, has been rejected by the association in its eleven-year history.<sup>8</sup>

Only members and their guests are admitted to the pool. The public is not admitted to the Wheaton-Haven facility upon the payment of an entrance fee.

Dr. and Mrs. Harry C. Press, two of the Negro Plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of the pool and, therefore, had no interest in the pool which he could transfer. In the spring of 1968, however, Dr. Press sought to obtain an application for membership in the pool from members of the pool's Board of Directors. Wheaton-Haven refused to furnish him with an application. The stipulated reason for not sending him an application was that Dr. Press is a Negro.

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. Around July 19, 1968, the Tillmans brought Grace Rosner, a negro woman, to the pool as a guest. On July 20, 1968, Wheaton-Haven promulgated a rule that limited guests to relatives of members. On July 24, 1968, and at all times since that date, Wheaton-Haven has refused to permit the Tillmans

<sup>7</sup> The community had integrated by 1967. Panel Finding No. 16, Apx. 15a.

<sup>8</sup> For purposes of this appeal, Montgomery County accepts this fact although the Commission found no Caucasian was ever rejected. Panel Finding No. 16, Apx. 15a.

to bring Mrs. Rosner to the pool as a guest. The limitation on guests, while perhaps precipitated by the admission of Mrs. Rosner on July 19, was intended to keep down the burgeoning number of guests.<sup>9</sup>

The pool facility was constructed pursuant to a "special exception" granted by the Montgomery County Board of Appeals.<sup>10</sup> Prior to granting the special exception, the Board required Wheaton-Haven to demonstrate its financial responsibility by submitting evidence that 60 percent of its projected construction costs were obligated or subscribed.<sup>11</sup>

<sup>9</sup> Interrogatories Nos. 29 and 31 of Plaintiffs-Appellants asked whether in 1968 and at the present time, Wheaton-Haven's policy has been to deny admission of Negroes to its facilities as the guests of members. The answer of Defendants-Appellees to both interrogatories is: "We did not have a written policy but we did have an understanding to discourage Negroes because we considered ourselves a private pool." The deposition of director McIntyre (a Defendant-Appellee), filed with the District Court, discloses beyond question that the relatives-only guest policy adopted on July 20, 1968, was intended to exclude Negroes as guests.

<sup>10</sup> The provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955, now Sec. 111-37z-4, Montgomery County Code 1965. In the ordinance, the Council stated, "... this action sets up the community swimming pools as a special exception . . . Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefited by such development." (Admis. Nos. 1, 2, Pl. Exh. 2 in the District Court).

<sup>11</sup> Wheaton-Haven also had the burden of showing the special zoning exception was in the public interest in that it did not adversely affect the present and future character and development of the community. Sec. 111-37z-4, Montgomery County Code 1965. In that regard, Wheaton-Haven presented evidence to the Board that the proposed facility was in lieu of a County facility

Wheaton-Haven does pay state and local real estate taxes, but is exempt from state and federal income taxes under the Annotated Code of Maryland, Article 81, Sec. 288(d)(8) (1969 Replacement Volume) and the Internal Revenue Code, Sec. 501(c)(7) exempting non-profit, member-owned and controlled recreational facilities.

It should be noted that the Panel on Public Accommodations of the Montgomery County Commission on Human Relations, in reviewing the history and actions of Wheaton-Haven, had the benefit of the application file of the County agency which gave the authorization for construction and use of the community swimming pool facility, the Montgomery County Board of Appeals, and that part of the agency file consisted of a complete transcript of the proceedings before the Board of Appeals. The duplicity of the Association was well documented. Probably, in 1958, no racial exclusiveness was considered. The neighborhood was not well integrated until 1967 (Panel Finding No. 15, Apx. 15a). The Association's Bylaws, adopted in 1958, had no racial covenants or restrictions on membership (Panel Finding No. 14, Apx. 15a). However, as time went by, it became impossible to maintain racial segregation. It was then that overt opposition to Negroes began and it was then that the Association betrayed its public trust.

---

to serve an imperative recreational need of the community, that the facility was needed for youths as a deterrent to juvenile delinquency, that the facility was for a community recreational need and not intended for private social functions, and that the facility would be advantageous and a public benefit to the community at large. Panel Finding No. 6, Apx. 13a.

**REASONS FOR GRANTING A WRIT OF CERTIORARI**

*Amicus curiae*, Montgomery County, Maryland, adopts and incorporates by reference the "Reasons for Granting the Writ" as advocated in the Petitioners' Petition for a Writ of Certiorari.

In addition, Montgomery County urges that this Court grant a Writ of Certiorari for the following reasons.

Montgomery County is a home-rule county chartered under the Constitution and laws of Maryland and granted full and plenary state police powers to enact local laws, including *inter alia* the regulation of racial discrimination in designated places of public accommodation. *Montgomery Citizens League v. Greenhalgh*, *supra*. Pursuant to its police power, Montgomery County has enacted a local law prohibiting racial discriminatory practices in places of public accommodation, resort or amusement, of any kind, including "swimming pools". The only exemption from said law pertains to "accommodations which are in nature distinctly private." Section 77-1, et seq. of the Montgomery County Code 1965, as amended by Chapter 18, Laws of Montgomery County 1968, and Chapter 33, Laws of Montgomery County 1969 (a copy of this law is found in Appendix A). Pursuant to this local law and acting upon verified complaints of the petitioners in this matter, the Montgomery County Human Relations Commission's Panel on Public Accommodations, an agency of Montgomery County, conducted an extensive investigation and public hearing at public expense, and found the present Defendant-Appellee, Wheaton-Haven Recreation Association, Inc., to be a public accommodation within Montgomery County acting in



violation of the aforesaid local law. The opinion and finding of fact of the Human Relations Commission's Panel is found in Appendix B. Pursuant to its opinion, finding and decision, a cease and desist order was issued by the Human Relations Commission's Panel.

Defendant-Appellee, Wheaton-Haven Recreation Association, Inc., has refused to comply with either the aforesaid cease and desist order or local law, and Montgomery County has filed suit in a Maryland State Court of general jurisdiction (Circuit Court for Montgomery County, Maryland) to enforce the cease and desist order and seek compliance with the provisions of the local law. This State suit is presently pending in the Circuit Court for Montgomery County, Maryland, and involves the identical parties, facts and relief sought in the federal litigation.

The decision of the Federal District Court is based partly on the finding that the Defendant-Appellee, Wheaton-Haven Recreation Association, Inc., is a private club as that term is defined under the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a) (Appendix C of Petition for Writ of Certiorari). While a federal court interpretation of a federal statute is not necessarily dispositive of a local law, the issue in this action as to the private nature of the Defendants'-Appellees' activities is of such a high degree of identity with the issue in the State court action that the Federal Court interpretations will have an adverse effect upon Montgomery County's case in the State court if the interpretation of the Federal Court is allowed to stand. Furthermore, the extraordinary involvement of identical parties and facts in both Federal and State courts raises the possibility that the doctrine of collateral estoppel could apply against the parties in a State



Court upon the termination of the Federal litigation. *Pat Perusee Realty v. Lingo*, 249 Md. 33, 238 A. 2d 100 (1968); *Maryland, Use of Gliedman v. Capital Airlines*, 267 F. Supp. 298 (D. Md. 1967).

The Defendant-Appellee operates its swimming pool facility by virtue of a "special exception" granted to it under the Zoning Ordinance of Montgomery County, Maryland. The special exception was granted by the Montgomery County Board of Appeals, and a copy of the opinion of the Board of Appeals as to this special exception is contained in Appendix C. The special exception granted is for the construction and use of a "community swimming pool" and not for a "private club". Under the Montgomery County Code a grant to operate a private club requires a special exception separate and distinct from that of a community swimming pool. By virtue of the decision and finding of the Federal Courts, the Defendants'-Appellees' operations are as a private club and, accordingly, the Defendant-Appellee may be operating its facilities contrary to the Montgomery County Zoning Ordinance.

Furthermore, the Defendant-Appellee has notified officials of Montgomery County, Maryland, that if the County persists in its State court action against the Defendant-Appellee in view of the decision of the U. S. District Court in this matter, a private civil suit will be instituted against Montgomery County and its officials (see Appendix D). Participation by Montgomery County in this matter may negate further court action by the County if appropriate relief is granted and also may negate the private civil action being contemplated by the Defendant-Appellee.

### SUMMARY OF ARGUMENT

Under the laws of the United States and local laws of Montgomery County, Maryland, Wheaton-Haven Recreation Association, Inc., is a public accommodation which cannot discriminate on the basis of race.

The findings and decisions of the U. S. Court of Appeals for the Fourth Circuit and the U. S. District Court for the District of Maryland that Wheaton-Haven Recreation Association, Inc., qualifies under Title II of the Civil Rights Act of 1964, 42 U.S.C., Sec. 2000a, as a private club sanction racial discrimination as prohibited by that law and destroy the legitimate enforcement and administration of Montgomery County's local public accommodations and zoning laws.

### ARGUMENT

It may well be true that Wheaton-Haven considers itself at this time a private club or, at least, that many of its members consider it to be a private club. Consistent with that desire, Wheaton-Haven, in recent years, has taken on a few accoutrements of a private organization. These contrived emblazonments, however, are not determinative of this controversy. They belie the factual history of the swimming pool facility. In attempting to metamorphose its genetic antecedents, Wheaton-Haven has repudiated its charter obligations which Montgomery County is seeking to reinstate.

The gravamen of Montgomery County's complaint against Wheaton-Haven is that it has defaulted on its representations and responsibilities to the County. In 1958, the organization sought authority from the County to construct and use a community swimming pool. To this end, the organization secured a special

zoning exception from the Montgomery County Board of Appeals for a "community pool." Sec. 111-37z-4, Montgomery County Code 1965. In addition to certain financial prerequisites, the Board had to find that the proposed use would be in the *public interest* in that it would not adversely affect the present or future character or development of the community. Wheaton-Haven presented extensive testimony that the facility was proposed in lieu of a county-built facility to meet an imperative community recreational need, that the facility was needed for community youths as a deterrent to juvenile delinquency, that the facility was for a community recreational purpose and not intended for social functions, and that the facility would be advantageous and beneficial to the community at large (Appendix B). The facts are clear that Wheaton-Haven represented that it was meeting a need for a community service. Conjunctively, in obtaining the special exception the organization also assumed a responsibility to provide a community service which the local governmental authorities were unable to provide. No private facility was created.

Wheaton-Haven chose its status as a community pool over another existing zoning category designated as "private club,"<sup>12</sup> Sec. 111-37n, Montgomery County Code 1965. After Wheaton-Haven received for eleven years the benefits and favored tax status of a community pool, the lower courts have now subverted the

---

<sup>12</sup> Private club: An incorporated or unincorporated association for civic, social, cultural, religious, literary, political, recreational or like activities, operated for the benefit of its members and not open to the general public. A private club is not afforded the same tax exempt status available to community pools. Annotated Code of Maryland, Art. 81, Sec. 288(d)(8) (1969 Replacement Volume).

purposes of the Montgomery County Zoning Ordinance by converting Wheaton-Haven to a private club. The Montgomery County Council was cognizant of this zoning distinction between private clubs and community swimming pools when it declared in 1962 that swimming pools were classified as public accommodations subject to the County anti-discrimination provisions. The lower courts failed to recognize the significance of these local laws and, in this failure, honored form over substance. Cf. *Tauber v. County Board of Appeals*, 257 Md. 202, 262 A. 2d 513 (1970) (imposing burden on applicant to meet public interest requisites).

Wheaton-Haven's present policy of racial segregation abrogates its duty as a public facility and adversely affects the future development of the community in that Negroes are discouraged from migration into the community, effectively creating a racial zoning ordinance without County sanction and which is inconsistent with and in derogation of the County's public policy established by enactment of a local fair housing law.<sup>18</sup> (Appendix A) See *Montgomery Citizens League v. Greenhalgh*, *supra*. There is a very real relationship between the opportunity for a Negro, or any other individual of a racial, color, religious or national origin minority group, to obtain housing in any geographic area and the accessibility of neighborhood recreational facilities. Everyone knows that the Wheaton-Haven swimming pool is open to everyone in its neighborhood—at least everyone who is white. Neighborhood swimming pools which are closed to

<sup>18</sup> Sec. 77-1, et seq., Montgomery County Code 1965, as amended by Chap. 18, Laws of Montgomery County 1968 and Chap. 33, Laws of Montgomery County 1969.

blacks inhibit their freedom and right to move into an integrated neighborhood. The County has a fair housing and public accommodations law which are reflective of the County's interest and concern in securing free and equal treatment of all its citizens. This interest and concern is consistent with federal law. It is in light of this community of interest that the impact of the lower courts' decisions must be viewed.

The Supreme Court has conclusively held the provisions of the Federal Public Accommodations Law, 78 Stat. 243 (1964), 42 U.S.C., Sec. 2000a (1970), to cover swimming areas and associated recreational facilities. *Daniel v. Paul*, 395 U.S. 298 (1969). The law is to be construed liberally and read broadly. *Miller v. Amusement Enterprises, Inc.*, 394 F. 2d 342 (5th Cir. 1968). From this broad coverage a narrow exemption was carved under Sec. 2000a(e) of the law for *bona fide* social, fraternal, civic and other organizations which *select* their own members. *United States v. Richberg*, 398 F. 2d 523 (5th Cir. 1968). To qualify for this exemption, the burden is upon Wheaton-Haven to establish that it is, *de facto* and not *de jure*, a private club. *Nesmith v. Young Men's Christian Association of Raleigh, N. C.*, 397 F. 2d 96 (4th Cir. 1968).

In determining whether an establishment is in fact a private club, *there is no simple test*. A number of variables must be examined in the light of the Act's clear purpose of protecting only 'the genuine privacy of private clubs . . . whose membership is genuinely selective . . . .' As one commentator observed, 'Where there is a large membership or a policy of admission *without any kind of investigation of the applicant*, the logical conclusion is that membership is not selective. . . .

[S]erving or offering to serve all the members of the white population within a defined geographical area is certainly inconsistent with the nature of a truly private club." *Nesmith v. Young Men's Christian Association of Raleigh, N. C.*, *supra*, at 101-102 (emphasis added).

The variables are considerable and no one criteria alone is fatal to or a conclusive determinant of the claimed exemption without consideration of the totality of facts. *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753 (D. Md. 1970). A comprehensive, but not exclusive, analysis of these variables is recited in *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969), where the District Court listed seven broad elements for consideration:

1. Membership genuinely selected on a reasonable basis;
2. Membership control over operation and property;
3. Manner of creation including advertising and solicitation of charter members;
4. Purpose of organization as it relates to social, fraternal or civic functions;
5. Formalities of organization;
6. Extent of invitation to public manifested by advertising, telephone listings, initiation fees, dues;
7. Use of private club tax exemptions and credit extended to members.

Of all these variables, the most frequently used factual test is whether the membership is genuinely selective.



*Scott v. Young*, 421 F. 2d 143 (4th Cir. 1970) *Cert. Denied*, 398 U.S. 929 (1970); *United States v. Jordan*, *supra*; *Stout v. Young Men's Christian Association of Bessemer, Alabama*, 404 F. 2d 687 (5th Cir. 1968); *United States v. Richberg*, *supra*; *Nesmith v. Young Men's Christian Association of Raleigh, N.C.*, *supra*; *Williams v. Rescue Fire Company*, 254 F. Supp. 556 (D. Md. 1966); *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 219 A. 2d 161 (1966); *United States v. Clarksdale King & Anderson Co.*, 288 F. Supp. 792 (N.D. Miss. 1965); *Castle Hill Beach Club v. Arbury*, N.Y., 2 N.Y. 2d 596, 162 N.Y.S. 2d 1, 142 N.E. 2d 186 (1957). Moreover, this factual test has become the conclusive law of the land.

The Virginia trial court rested on its conclusion that Little Hunting Park was a *private social club*. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographical area, *there being no selective element* other than race. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969) (emphasis added).

Elements of this factual test that membership be genuinely selective on a reasonable basis have been repeatedly articulated and determined in numerous court cases. Wheaton-Haven has failed to meet any of these indicia of private clubs. These elements are as follows:

1. Whether members, *in fact*, control the membership procedure through actual notice of prospective applicants, power of blackball and membership revocation. *Bell v. Kenwood Golf and Country Club, Inc.*, *supra*; *United States v.*

*Jordan, supra; Clover Hill Swimming Club v. Goldsboro, supra; Williams v. Rescue Fire Company, supra; United States v. Clarksdale King & Anderson Co., supra; Castle Hill Beach Club v. Arbury, N.Y., supra.*

2. Whether prospective members are required to be recommended for membership by one or more existing members. *Stout v. Young Men's Christian Association of Bessemer, Alabama, supra; United States v. Jordan, supra.*
3. Whether there is any limit on the number of members other than the capacity of the facility. *Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra; United States v. Jordan, supra; Clover Hill Swimming Club v. Goldsboro, supra.*
4. Whether there is any manifestation of standards for membership qualifications including such factors as articulated personal requirements (social position, reputation, residence), rejection rates, extent of applicant investigation, reference requirements, time period for approval, rates of membership revocation, and formalities of initiation (fees, dues, ceremonies, documents). *United States v. Jordan, supra; Stout v. Young Men's Christian Association of Bessemer, Alabama, supra; United States v. Richberg, supra; Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra; Williams v. Rescue Fire Company, supra; Castle Hill Beach Club v. Arbury, N.Y., supra.*

The determination of whether or not an organization is entitled to the "private club" exemption contained

in subsection (e) of Section 2000a of Title 42 of the U.S. Code is a question of law. *United States v. Richberg, supra*. Here, the underlying facts are not in dispute. Unfortunately, the findings of the Court of Appeals reflect such an erroneous misinterpretation of the undisputed facts in this controversy that a detailed examination of the findings must be undertaken. This is necessary because the unprecedented findings of privacy by the lower court are clearly erroneous or unsupported or are mere superficial variables which nither collectively, nor individually, can be held, as a matter of law, to be conclusive. The findings of the Court of Appeals were as follows:

1. "Its structure is that of a private association, though that is not of great weight, since it is relatively easy for a place of public accommodation to take on the formal features of a club without changing its nature. Unlike every organization which has ever been held to be a 'sham' private club, Wheaton-Haven is owned, operated and controlled entirely by its membership." 451 F. 2d at 1219-1220.

The Court was correct in admitting that no great weight can be given to the "structure" of Wheaton-Haven. This consideration together with "ownership" are transparent formalities of a private club and which fail to look beyond the corporate shell to the real purpose of the organization, i.e., to provide a community swimming facility to all white persons living within a prescribed geographic area. *United States v. Richberg, supra*. Here, the Court applied a variable used in *Daniel v. Paul, supra*, i.e., traditional formalities associated with a private club, self-government and member ownership. Moreover, the corollary to this

rule was adopted in *Bell v. Kenwood Golf and Country Club, Inc., supra*, where the court refused to make the absence of self-government fatal to a claim for the exemption of a private club. However, this one factor of member ownership has never been held conclusive and is more than outweighed by Wheaton-Haven's open invitation to the white community as manifested by: its active and unqualified solicitation of charter members; its advertising membership availability by a large conspicuous sign posted at the pool; its superficial membership approval procedure which lacks any meaningful interview, investigation or evaluation of membership qualifications; its low, if not negligible rejection of whites; and its failure to make membership available to Negroes despite their presence in the community (Panel Findings Nos. 7, 12, 15, 16, 17, 18; Apx. 13a-15a).

2. "It was initially financed through the initiation fees of the first members, and new members must make a comparatively heavy investment of \$375 in order to join." 451 F. 2d at 1220.

This consideration is not a valid consideration. In *Bell v. Kenwood Golf and Country Club, Inc., supra*, the initiation fees, depending on membership classification, ranged from \$600 to \$1,500. 312 F. Supp. at 755. The Kenwood Golf and Country Club is located in Montgomery County also, and it is unrealistic to state that \$375 is a "heavy investment" in Montgomery County.

3. "The members of the Board of Directors are required to be club members." *Id.*

No express qualification for membership exist. There is *de jure* control of the operation of facilities and

selection of members. But this is not a valid consideration in light of the fact that there is no actual membership control other than an annual meeting! This point is nothing more than another meaningless traditional formality.

4. "Regular membership meetings are held, and member participation is strickingly high." *Id.*

This finding is, unfortunately, misleading. The only "regular membership meeting held" is the *annual* membership meeting. That is the only real membership participation which exists in this association.

5. "Substantial annual dues are charged, and members are liable for further assessments if the dues are insufficient to meet annual expenses." *Id.*

Again, *Bell v. Kenwood Golf and Country Club, Inc., supra*, is dispositive. It is absolutely unreasonable to conclude that in Montgomery County, Maryland, an annual dues of \$50-\$60 is substantial. Such a conclusion fails to recognize the reality of the operative facts. The pool facility is located in an affluent section of Montgomery County which is one of the very wealthiest counties in the United States.

6. "Only members and their guests can use the pool. There is no way in which a non-member, by payment of an admission fee, can gain entrance." *Id.*

These two indicia are coupled because they are similar. They are mere self-serving devices which represent a bootstrap conclusion and must yield to the obvious reality that all organizations declaring themselves pri-



vate clubs have so limited the use of their facilities. Despite such self-serving declarations of privacy and the restrictions on use, the courts have universally taken substance over form to determine whether there is *in fact* a private nature to the organization. *Sullivan v. Little Hunting Park, supra*; *United States v. Richberg, supra*; *Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra*; *United States v. Clarksdale King and Anderson Co., supra*.

7. "Nor does Wheaton-Haven publicly solicit members." *Id.*

This conclusion is erroneous. The solicitation of members by Wheaton-Haven, prior to pressures for integration, were open and notorious. There is no question as to Wheaton-Haven's open invitation to the white community. Note subparagraph 1, *supra*; also Panel Findings Nos. 6, 7, 12, 16, 17, 18; Apx. 13a-15a. The only membership qualification was an ability to pay. Furthermore, the stated purpose of the organization was not social or fraternal, but purely to serve a community recreational need. These factors, in addition to Wheaton-Haven's inability to meet the genuine selectivity test, *infra*, would deny to the organization the private club exemption under the criteria set forth in *United States v. Jordan, supra*.

8. The Court of Appeals also deduced that Wheaton-Haven does not hold itself out in any way as serving the general public. *Id.*

This conclusion must be an attempt to neutralize *Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra*. This conclusion is possibly the most extreme example of embracing form over sub-



stance in the appeals court's decision. How can the court ignore the admissions by Wheaton-Haven as to serving the "recreational needs of the community" (Panel Finding No. 6, Apx. 13a), the indiscriminate solicitation of funds to meet construction costs (Panel Finding No. 7, Apx. 13a), the sham interviews (Panel Finding No. 12, Apx. 14a-15a), the posting of the invitation sign (Panel Finding No. 17, Apx. 15a), and the low rejection rate (Panel Finding No. 16, Apx. 15a)?

9. The lower court also found that it was not relevant that "for zoning purposes" the name "community swimming pool" was used. *Id.*

This finding evidences the lower court's failure to consider the significance and importance of zoning laws. Zoning laws are second to no other statutory body in regulating the conduct of individuals or groups. On a local level, the power and pervasiveness of zoning laws is ominous. Possibly no other body of law contains as many "words of art." "Community swimming pool" did not mean "private swimming pool". There was provision under the County zoning laws for a "private swimming pool." Wheaton-Haven, properly, did not seek a special exception as a private swimming pool. It declared that it intended to serve the community, to serve as a deterrent to juvenile delinquency, to serve the recreational needs of the community (Panel Finding No. 6, Apx. 13a). The Montgomery County Council, in enacting the relevant zoning code provision, recognized that "community swimming pools" were to meet "community needs" (Panel Finding No. 5, Apx. 12a-13a).

10. Finally, the appeals court made a finding that Wheaton-Haven met the test of exclusivity. 451 F. 2d at 1220-1221.

As to this finding, the court failed to point to any item within the operative facts other than commenting on the rejection rate of one white applicant. The court stated that some considerations are "implicit". This conclusion by the lower court is completely unfounded. Indeed, it is the area of selectivity that Wheaton-Haven is most vulnerable. This test is the most important one. The test is set forth in *Sullivan v. Little Hunting Park, supra* and *Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra*. Wheaton-Haven admittedly possesses no articulated admission standards and performs only a superficial interview with no membership reference requirement or even a rudimentary investigation of the applicant's basic character traits, social or economic position. The rejection of one white applicant since inception (an eleven-year period) clearly manifests Wheaton-Haven's "open door" policy to the community and easily meets the ninety-nine percent acceptance of whites ratio present in *Nesmith, supra*. In *Nesmith*, five whites were rejected in a one-year period. As in *Nesmith*, Wheaton-Haven has rejected one hundred percent of Negro applicants. The appeals court erroneously allowed counsel for Wheaton-Haven to state at oral argument that other white applicants had been informally rejected. This statement is completely unfounded. There is no evidence in the record below to substantiate this self-serving testimony of Wheaton-Haven's counsel. 451 F.2d at 1221, n. 23. The testimony is in diametric conflict with the sworn answer of Wheaton-Haven to the Petitioners' interrogatory No.

17 which indicates that no one other than Dr. Press was ever denied an application form.

It also should be noted that there was no finding by either of the lower courts that the membership actually controlled the selection process. The cases are replete with findings that membership committees alone do not constitute any real manifestation that the membership actually selects new members. *Stout v. Young Men's Christian Association of Bessemer, Alabama, supra*; *Nesmith v. Young Men's Christian Association of Raleigh, N.C.*; *Clover Hill Swimming Club v. Goldsboro, supra*; *Williams v. Rescue Fire Company, supra*; *United States v. Clarksdale King & Anderson Co., supra*.

Furthermore, the District Court's failure to consider the low ratio as a significant factor of non-privacy is inconsistent with that court's prior holding in *Williams v. Rescue Fire Company, supra*, where the court did consider the absence of rejection and a low revocation ratio. The case law on this point stands for the proposition that low rejection ratios are indicative of a non-private nature. *Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra*. It indeed would be hard to find a truly bona fide private club whose existence is fostered by social selectivity with such a low rejection rate.

Two final points should be considered. The lower courts placed some significance on Wheaton-Haven's membership limitation of 325 families. This element is misleading because it ignores the reality that a limit on membership to those who can be effectively served by the capacity of the facility is a normal incident of such a recreational facility, public or private. The

element has also been held to be an insignificant factor, and does not operate to change a public accommodation to a private club. *United States v. Jordan, supra*; *Clover Hill Swimming Club v. Goldsboro, supra*.

Furthermore, the fact that thirty percent of the membership can be drawn from outside the geographic area of the neighborhood is irrelevant. This element also is misleading because it ignores the fact that a substantial majority, at last seventy percent of the membership, is drawn from a specified geographical area and any white person living in that area is accorded a priority for membership over the general public. It should be recognized that in *Williams v. Rescue Fire Company, supra*, it was held that a swimming pool was not afforded the private club exemption despite the fact that twenty-five percent of the membership actually resided outside the geographic area. In any event, *Sullivan v. Little Hunting Park, supra*, is dispositive of this point because the swim club there had the same provisions as here and failed to qualify as a private club.

Primary importance must be given to the fact that all the indicia of privacy came into being well after the swimming pool was constructed and fully operational. It was only with the advent of racial integration in the neighborhood that the swimming pool aspired to exclusivity. The Opinion and Findings of Fact of the County's Human Relations Panel on Public Accommodations establish beyond any doubt that the swimming pool facility was conceived in "openness" and has embraced "privacy" only recently (Appendix B). The totality of Wheaton-Haven's operations leads to only one conclusion:

Its existence is transparently meretricious and paper thin. To hold that it was an exempt club would make a mockery of the club exemption, would pervert the congressional purpose and would legitimize a mere stratagem." *United States v. Richberg, supra* at 529.

#### CONCLUSION

For the foregoing reasons, Wheaton-Haven should not be entitled to an exemption as a private club under Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a) and, therefore, the judgment below should be reversed.

Respectfully submitted,

RICHARD S. MCKERNON

*Acting County Attorney for  
Montgomery County, Mary-  
land*

ALFRED H. CARTER

*Deputy County Attorney*

WILLIAM J. CHEN, JR.

*Assistant County Attorney*

County Office Building  
Rockville, Maryland 20850

March 1972



**APPENDIX A**

Enacted November 4, 1969  
Effective November 4, 1969

COUNTY COUNCIL  
FOR MONTGOMERY COUNTY, MARYLAND

SEPTEMBER LEGISLATIVE SESSION 1969

**CHAPTER 33**

**BILL No. 46-69**

AN ACT to add two new articles to the Montgomery County Code 1965, to be known as Article I, title "Commission on Human Relations," and Article II, title "Discrimination in Places of Public Accommodation," Chapter 77, to directly precede Chapter 77, Section 77-13 as enacted by Chapter 19 of the Laws of Montgomery County 1968; to create a Commission on Human Relations who shall research, study, advise and investigate matters relating to any practice of discrimination, prejudice, intolerance or bigotry that may exist on account of race, color, religious creed, ancestry or national origin; shall exercise educational programs and use persuasion in the elimination of such practice; to initiate or receive complaints of discrimination, prejudice, intolerance and bigotry which deprives persons of equal rights, protection or opportunity; to seek conciliation of such complaints and make recommendations, procedures, programs or legislation to eliminate discrimination; to proceed with other programs to relieve group tension from causes not related to race, color, religious creed, ancestry or national origin; to create a Commission Panel on Public Accommodations in accordance with administrative and constitutional due process to prohibit discriminatory practices against any person on account of race, color, religious creed, ancestry or national origin in every place of public accommodation, resort or amusement of any kind,



in Montgomery County, Maryland, whose facilities, accommodations, services, commodities or use are offered or enjoyed by the general public, either with or without charge, but shall not include any accommodations which are in their nature distinctly private, and to assure nondiscrimination to all persons, coexistent with the intent and purposes but not necessarily the scope or limitation of the Public Accommodations Provision of the United States Civil Rights Act of 1964; to assure enforcement of the provisions of this enactment within its terms; and to have the County Executive, with the approval of the County Council, appoint members to the Commission on Human Relations, Commission Panel on Public Accommodations and Commission Panel on Housing.

*Be It Enacted by the County Council for Montgomery County, Maryland, that—*

Sec. 1. There are hereby added two new articles to the Montgomery County Code 1965, to be known as Article I, title "Commission on Human Relations," and Article II, title "Discrimination in Places of Public Accommodation," Chapter 77, to directly precede Chapter 77, Section 77-13 as enacted by Chapter 19 of the Laws of Montgomery County 1968, to read as follows:

#### **Article I. Commission on Human Relations**

##### **Sec. 77-1. Statement of Policy.**

It is hereby declared to be the public policy to eliminate discrimination, prejudice, intolerance or bigotry of any forms that may exist on account of race, color, religious creed, ancestry or national origin.

It is further declared to be the public policy of the county that discrimination in housing and places of public accommodation against any person on account of race, color, religious creed, ancestry or national origin is contrary to

the morals, ethics and purposes of a free, democratic society; is injurious to and threatens the peace and good government of this county; is injurious to and threatens the health, safety and welfare of persons within this county; and is illegal and should be abolished.

Sec. 77-2. Created; membership, appointments and term of office of members; Commission Panels.

There is hereby established a Commission on Human Relations. The Commission shall consist of not less than nine (9) members and not more than fifteen (15) members to be appointed and may be removed for cause by the County Executive with the approval of the County Council and who shall be broadly representative of the racial, religious, and ethnic groups of the County. The terms of the members of the Commission shall be for one, two, or three years, as prescribed by the County Executive at the time of appointment, so as to provide for the vacating of the terms of one-third of the members of the Commission annually. Each member of the Commission shall continue to serve after his term until his successor has been appointed and has qualified. The County Executive, with the approval of the County Council, shall appoint a Commission Panel on Public Accommodations, a Commission Panel on Housing, and any further panel as determined by law.

Sec. 77-3. Officers; meetings; quorum; voting.

The County Executive may designate a member of the Commission on Human Relations to be Chairman and, in the absence of any member being designated, the Commission may elect a Chairman notwithstanding their authority to elect such other officers as it may deem necessary. The Commission shall hold meetings at regular intervals but not less frequently than once every month. A majority of the members of the Commission shall constitute a quorum for the transaction of business, and a majority vote of those

present at any meeting shall be sufficient for any official action taken by the Commission.

**Sec. 77-4. Executive Secretary; additional personnel; budget preparation.**

A member of the County Executive's staff or his acting designee shall serve as executive secretary of the Commission on Human Relations and shall assist the Commission Panels as determined by law. Other personnel and facilities may be authorized by the County Executive to assist the Commission in carrying out the provisions of this Chapter. The Commission may, with the approval of the County Executive engage the services of volunteer workers and consultants without salary, who may be reimbursed their out-of-pocket expenses incurred in the course of performing such services. Services of an individual as a volunteer worker or consultant pursuant to this Chapter shall not be considered as service of employment bringing such individual within any Merit System of the County or State of Maryland. In proposing a budget for the operation of the Commission and in selecting other personnel and facilities the County Executive shall take into consideration the recommendations of the Commission.

**Sec. 77-5. Compensation and expenses of members.**

The members of the Commission on Human Relations shall serve without compensation, but they may be reimbursed for all expenses necessarily incurred in the performance of their duties in accordance with appropriations made by the County Council.

**Sec. 77-6. Duties generally.**

(1) The Commission on Human Relations shall have the power and it shall be its duty:

(a) To research, assemble, analyze, and disseminate pertinent data and educational materials relating to activities

and programs which will assist in the elimination of prejudice, intolerance, bigotry, and discrimination, and to institute and conduct educational and other programs, meetings, and conferences to promote equal rights and opportunities of all persons regardless of their race, religious creed, ancestry or national origin and to promote good will, cooperation, understanding, and human relations among all persons of different races, colors, religious creeds, ancestries or national origins. In performance of its duties, the Commission shall cooperate with interested citizens, racial, religious and ethnic groups, community, business, professional, technical, educational and civic organizations.

(b) To cooperate with the County Executive; and all governmental agencies concerned with matters within their jurisdiction.

(c) To study and investigate by means of public or private meetings, conferences and public hearings conditions which may result in discrimination, prejudice, intolerance and bigotry because of race, color, religious creed, ancestry or national origin.

(d) To advise and counsel the residents of Montgomery County, the County Council, the County Executive and the various departments of County, State and Federal governments on matters involving racial, religious, or ethnic prejudice, intolerance, discrimination and bigotry and to recommend such procedures, program or legislation as it may deem necessary and proper to promote and insure equal rights and opportunities for all persons, regardless of their race, color, religious creed, ancestry or national origin.

(e) To work to remove inequalities due to discrimination, prejudice, intolerance and bigotry on such problems as housing, recreation, education, health, employment, public accommodations, justice and related matters.

(f) To initiate or receive complaints of discrimination, prejudice, intolerance and bigotry from any person or group

because of race, color, religious creed, ancestry or national origin which deprives that person or group of equal rights, protection or opportunities. To investigate complaints, seek conciliation of such complaints, and if warranted, to hold hearings and make recommendations on such complaints. Neither the Commission as a whole, nor any of its members not serving on a panel, shall engage in any of the functions or jurisdictions assigned to a Commission Panel or the Executive Secretary.

(g) To adopt such rules and procedures as may be necessary to carry out the purposes and provisions of this Chapter; to keep a record of its hearings, activities, and minutes of all meetings, said records and minutes shall be on file with the Executive Secretary of the Commission and open to the public at reasonable business hours upon request.

(h) To render at the request of the Executive or within thirty (30) days following each quarter of the calendar year preliminary written or oral reports of its activities and recommendations to the County Executive and the County Council and a final written yearly report summarizing its activities, goals, needs, and recommendations.

(2) Despite the foregoing provisions of this law, the Commission is authorized to proceed with other programs which will seek to relieve group tension and/or adverse intergroup activities which may result from causes not related to race, color, religious creed, ancestry or national origin provided that such action is first submitted to the County Executive and further provided that the County Executive does not disapprove such action.

#### Sec. 77-8. Committees, Advisory Committees.

The Chairman of the Commission on Human Relations may, with the approval of the Commission, appoint com-



mittees from its members to assist in carrying out any of the functions and duties of the Commission. Any committee appointed shall consist of not less than three members.

The Chairman of the Commission may appoint advisory committees of citizens and at least one Commission member as in his judgment will aid in effectuating the purposes of this Article. Advisory committee action shall not be deemed to be the actions of the Commission and shall in no way bind the Commission or its members.

## Article II. Discrimination in Places of Public Accommodation.

### Sec. 77-9. Applicabilty of article.

This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall apply and be applicable to every place of public accommodation, resort or amusement of any kind in the county whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public, either with or without charge, and shall include, but not be limited to, the following types of places, among others: All restaurants, soda fountains and other eating or drinking places and all places where food is sold for consumption either on or off the premises; all inns, hotels, and motels, whether serving temporary or permanent patrons; all retail stores and service establishments; all hospitals and clinics; all motion picture, stage and other theaters and music, concert or meeting halls; all circuses, exhibitions, skating rinks, sports arenas and fields, amusement or recreation parks, picnic grounds, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool rooms and swimming pools; all places of public assembly and entertainment of very kind; but shall not include any accommodations which are in their nature distinctly private.



**Sec. 77-10. Prohibited acts.**

It shall be unlawful for any owner, lessee, operator, manager, agent or employee of any place of public accommodation, resort or amusement within the county:

(a) To make any distinction with respect to any person based on race, color, religious creed, ancestry or national origin in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

(b) To display, circulate or publicize or cause to be displayed, circulated or publicized, directly or indirectly, any notice, communication or advertisement which states or implies that any facility, service, commodity or activity in such place of public accommodation, resort or amusement will not be made available to any person in full conformity with the requirements of subsection (a) of this section or that the patronage or presence of any person is unwelcome, objectionable, unacceptable or not desired or solicited on account of any person's race, color, religious creed, ancestry or national origin.

**Sec. 77-11. Commission Panel on Public Accommodations; Authority Enforcement procedures.**

(a) The Commission's Panel on Public Accommodations shall be selected and have the functions enumerated in Section 77-13(d), Chapter 19 of the Laws of Montgomery County 1968.

(b) The Commission Panel on Public Accommodations shall have the authority and power enumerated in Section 77-16, Chapter 19 of the Laws of Montgomery County 1968, except that Section 77-16(a) thereof insofar as it applies to Sec. 77-11(b) herein shall be concerned with public accommodations in lieu of housing and real property matters.

(c) The Commission Panel on Public Accommodations shall have the procedures for enforcement as enumerated in Section 77-17, Chapter 19 of the Laws of Montgomery County 1968.

**Sec. 77-12. Penalty for violation of article; injunctions.**

Any person who violates any of the provisions of this Article relating to discrimination practices, or any rule or regulation pertaining thereto, shall be subject to injunctive or other appropriate action or proceeding to correct any violation of this Article, and any Court of competent jurisdiction may issue restraining orders, temporary or permanent injunctions or other appropriate forms of relief.

**Sec. 2.** Notwithstanding Section 77-2 and on the effective date hereof, the appointment and terms for members of the Commission on Human Relations, Commission Panel on Public Accommodations and Commission Panel on Housing shall be those members and such remaining terms thereof that existed on September 11th, 1969.

**Sec. 3.** The provisions of these Articles are severable and if any provision, section or part thereof is held invalid it shall not affect or impair any of the remaining provisions.

**Sec. 4.** The County Council declares an emergency exists as to the need of the enactment of Article I and II of Chapter 77, and the above shall become effective immediately upon adoption.

**Sec. 5.** Prior to December 7, 1970, the word "County Executive" shall mean the County Council except in Section 77-4 where it shall mean County Manager.

Certified correct as passed.

---

President

---

Secretary

## APPENDIX B

MONTGOMERY COUNTY COMMISSION ON HUMAN RELATIONS  
PANEL ON PUBLIC ACCOMMODATIONS

CASE No. P. A. 6

MR. AND MRS. MURRAY TILLMAN AND DR. AND  
MRS. HARRY CODY PRESS, *Complainants*

v.

WHEATON-HAVEN RECREATION ASSOCIATION,  
INC., *Respondents***Opinion, Including Findings of Fact, Conclusion of Law,  
Panel Decree and Final Order**

On September 17, 1968, Mr. and Mrs. Murray Tillman instituted a complaint against the respondent, Wheaton-Haven Recreation Association, Inc., alleging violation of the County Public Accommodations Ordinance, Chap. 77, Sec. 77-9 and 10, Laws of Montgomery County (1968) (hereinafter referred to as the "Ordinance").

The basis of the complaint alleges that on July 24, 1968, Mrs. Grace Rosner, a Negro, was refused admittance to respondent's pool as a guest of the Tillmans, bona fide members of respondent. This refusal to admit Mrs. Rosner was allegedly based upon her lack of family relationship to a member despite the fact that she was admitted as a guest on July 19, 1968 and the family relationship criteria was not applied to Caucasian guests. The complaint also made reference to a long-standing policy of systematic racial discrimination and deprivation to some of respondent's members of their basic legal rights. These allegations were supported by accompanying affidavits, executed by several members of respondent.

On November 13, 1968, Dr. and Mrs. Harry Cody Press also instituted a complaint against the respondent, similarly alleging a violation of the Ordinance. The Press complaint

was based upon allegations that they were deprived of a membership application and subsequent admission to membership in May, 1968, solely on the ground that they are Negroes.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the Executive Secretary of the County Human Relations Commission, Bertram L. Keys, Jr., conducted an investigation of the facts and made a finding of probable cause to credit the allegations contained in the complaints. Mr. Keys also attempted unsuccessfully to conciliate the matter pursuant to the foregoing section of the Ordinance and has notified respondent that his office is still available for this purpose up to and including the present date.

The Commission's Panel on Public Accommodations ordered the complaints consolidated for a determination of the common issue involved and conducted a public hearing at 8:00 o'clock P.M., April 24, 1969, in the first floor auditorium of the County Office Building, 108 South Perry Street, Rockville, Maryland. The hearing was conducted pursuant to Sec. 77-5(3)(b) of the Ordinance.

The panel consisted of Gerald D. Morgan, Chairman and Presiding Officer, Dr. Thomas A. Cook, Jr., and Lawrence D. Burke, Commissioner. The case in support of the complaints was presented by Philip J. Tierney, Esq., Assistant County Attorney. Also participating were Stanley D. Abrams, Esq., Assistant County Attorney, and Samuel A. Chaitovitz, Esq., of the American Civil Liberties Union, representing Mr. and Mrs. Tillman.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the respondent was summoned to appear through four (4) representatives alleged in the complaint to have fostered the violation of the Ordinance. The four, Philip Trusso, Bernard Katz, Anthony J. DeSimone, and Brian Carroll, avoided the summons and did not appear. Counsel for respondent, William N. Dunphy, Esq., appeared and ad-

vised the Panel that his client did not choose to be present and challenged *inter alia* the jurisdiction of the Panel to conduct the hearing as respondent was alleged to be distinctly private in nature. Mr. Dunphy advised the Panel of equitable relief sought on behalf of respondent in the Circuit Court for Montgomery County and requested the hearing be suspended pending the outcome of his litigation. The Panel overruled respondent's motion. Mr. Dunphy then left and the Panel proceeded with the hearing.

As a result of all the evidence received at the public hearing, the Panel members make the following findings of fact, conclusion of law, decision, and final order.

#### FINDINGS OF FACT

1. The complainants, Mr. and Mrs. Murray Tillman, are taxpaying residents of the County and have been bona fide members of respondent since 1961.

2. The complainants, Dr. and Mrs. Press, have been taxpaying residents of the County since 1965. The Presses are Negroes. They live within the prescribed geographical boundaries, as contained in respondent's By-Laws, that would make them available for membership in respondent.

3. Respondent, Wheaton-Haven Recreation Association, Inc., is a non-profit Maryland corporation organized on May 23, 1958 for the purpose of operating a swimming pool for the recreation of the prescribed community. The respondent's business address is 10910 Horde Street, Silver Spring, Maryland, 20902.

4. Respondent pool was constructed in 1958-1959 subsequent to a special exception granted September 23, 1958 by the Montgomery County Board of Appeals, pursuant to Zoning Ordinance as recited in Sec. 107-28(Z-4), Montgomery County Code (1955).

5. The foregoing zoning provision was enacted by the Montgomery County Council by Ordinance No. 3-28,



dated May 24, 1955. The Council stated therein that "... this action sets up the community swimming pools as a special exception. . . . The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

6. On August 13 and August 23, 1958, the Board of Appeals conducted public hearings on Case No. 656, respondent application for the special exception. The record of these proceedings indicates that respondent's witnesses testified that the County was unsuccessfully approached to construct a pool, that in lieu of County action respondent initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

7. Prior to the grant of the special exception, the Board required respondent to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed. During early 1958, respondent conducted an intensive membership drive. A circular was published and distributed to surrounding neighborhoods and communities that requested an immediate and unqualified call for membership. Apparently no Negroes lived within the geographic area of the pool at the time. Door-to-door solicitations were conducted by respondent members to obtain membership and a minimum Twenty Dollar (\$20.00) pledge. No qualifications were placed upon the respondent solicitors regarding membership criteria. On July 9, 1958 an open meeting was conducted by respondent's promoters on public grounds, the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, to further solicit and promote membership. These efforts resulted in meeting the zoning requisites.



8. During hearing before the U. S. Senate Finance Committee regarding H. R. 7125 (later to become P. L. 85.859—Excise Tax Exemption) conducted on July 15, 16, and 17, 1958, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified that the community pool was an instrument utilized to serve an imperative recreational need in Montgomery County owing to the failure of government to construct public pools due to lack of adequate resources. The pools were held to provide a healthy and constructive outlet for youth and general benefit to the public at large. The pools provide recreation to lower middle income groups that would otherwise be unavailable. The community pool was held distinguished from private country clubs and their attendant social program.

9. On June 12, 1962, the County Council adopted the Ordinance, Sec. 2 of which specifically provided that the definition of a public accommodation shall include swimming pools. At the time the Ordinance was enacted, there were no public, government-operated, swimming pools in existence within Montgomery County. There were, however, forty-three (43) community pools in operation in the County, including respondent.

10. Respondent is exempt from and does not pay federal or state income taxes under the provision of the U. S. Internal Revenue Code, Chapter 501, Sec. C(7) and the Maryland Code, Art. 81, Sec. 88(g)(8). Respondent also obtained an exemption from U. S. Excise Taxes during the years 1958 through 1964. All this tax relief was granted respondent because of its function as a community swimming facility.

11. Respondent operates exclusively as a community swimming facility conducting no social functions and its membership is solicited solely for that recreational purpose.

12. Before 1964 respondent did not conduct personal interviews with applicants. Recently respondent has insti-

tuted a policy of conducting personal interviews with applicants, but no social, formal or business background data is obtained from these interviews. The sole purpose of the interview is apparently to observe the physical appearance of the applicant.

13. Membership in respondent is not personal to the individual but runs to family units.

14. Respondent's By-Laws, adopted July 31, 1958, contain no racial covenants or restrictions on membership which is limited only to a prescribed geographic area and thirty (30) percent of the total membership may be excluded from that limitation.

15. By 1967 the neighborhood within the prescribed geographic area was a well-integrated community.

16. No Caucasian applicant has ever been rejected for membership in respondent.

17. Respondent, until May, 1968, posted the telephone number of the membership chairman on a large sign located in a conspicuous position at the pool, thus serving as an open invitation for membership. It was common knowledge in the community that respondent membership was open.

18. Until the summer of 1964, no racial discrimination policy was overtly manifested by respondent. That summer respondent refused to permit integrated swimming teams to utilize respondent facility. Some of respondent's members protested this policy and sought to change it. However, on November 11, 1964, at the annual open membership meeting of respondent, a proposal to change the swim team racial policy was rejected.

19. Subsequently, respondent refused to admit into the pool Negro babysitters who cared for children of members, while Caucasian babysitters of members were admitted.

20. On July 19, 1968, Mrs. Grace Rosner, a Negro, accompanied the Tillmans as their guest to respondent pool

and was admitted to the pool despite an altercation with Anthony J. DeSimone, who attempted to prohibit the admission of Mrs. Rosner. On July 24, 1968, Mrs. Rosner returned to the pool with the Tillmans, but was denied admission because of a newly promulgated rule that limited guests only to relatives of respondent members. This rule was not in existence prior to July 20, 1968. The rule was not enforced toward Caucasian guests. The respondent, through its gate attendants and officers, instructed members to lie about the relationship of their Caucasian guests, thereby avoiding the application of the rule.

21. In April, 1968, respondent, upon a good faith inquiry, failed to send a membership application to Dr. and Mrs. Press. The Presses have been and presently are willing to join respondent and are able to assume the financial responsibilities of membership. The Presses intended to use respondent pool as a convenient recreational facility that is available to their Caucasian neighbors and the Caucasian playmates of their children. In May, 1968, respondent officials expressly refused to consider the Presses for membership solely because of their race.

22. Brian Carroll, Anthony J. DeSimone, Bernard Katz, and Philip Trusso, officials of respondent, published and promoted on several occasions to witnesses appearing before the Panel that respondent pool was segregated and had a policy to continue such segregation.

23. On November 12, 1968, at a general membership meeting, the membership of respondent, by a vote of 81-25, endorsed the discriminatory policies practiced to that date.

#### CONCLUSIONS OF LAW

The core issue deals with whether the composition of people gathered at a swimming pool open to the neighborhood must include Negro friends and neighbors. If the complainants possess legally protected rights which respondent has abused, the respondent's conduct must

be circumscribed to comply with these rights. The respondent planned and built a swimming pool with its own funds to provide recreation for a prescribed community in Wheaton. Respondent contends the pool is private, that complainants have no rights concerning the pool, and it is free to pick and choose those who can swim. The view we take renders these contentions sophistic.

# I

A party claiming exemption from the Ordinance as an organization distinctly private in nature has the burden of demonstrating this assertion. Respondent's failure to appear and present evidence of a private nature does not help its case, but the purposes of our analysis we have attempted to view the facts in a light most favorable to respondent. The exemption to the Ordinance was designed to cover private organizations created to protect the personal associational preference of its members. However, a naked claim that an organization is private in nature will not stand if an examination reveals the organization lacks the characteristics usually attributed to such a private organization. We shall first examine respondent's qualification for this exemption.

The pool was built and operated solely as a community recreational facility and possesses none of the accoutrements of a private club, that is, rank, society, and selectivity. The pool has been accessible to the entire neighborhood Caucasian population without qualification. In fact, respondent's By-Laws allow thirty (30) percent of the membership to come from the *public at large*. The only concrete membership standard that has surfaced during respondent's existence is the ability to pay. The pool operates no social programs and the membership itself runs to the family unit rather than the individual. That respondent exercises no policy of genuine selectivity is manifested by the open invitation to neighborhood Caucasians with no evidence any of these applicants were ever rejected.

The recent employment of the interview device and a relatives-only guest rule supposedly throws a blanket of selectivity over respondent. However, the facts indicate these methods were merely a subterfuge, the objective of which was to test the color of the applicants' skin and exclude Negroes. Neither device has been applied consistently to Caucasians nor has respondent ever pursued a policy of exclusiveness toward Caucasians. By application of these afterthoughts, respondent attempts to take on a new appearance; we find he cannot use such methods to make a private club out of an organization with an alien nature.

But perhaps the most conclusive evidence of respondent's true nature can be found in the testimony submitted on its behalf before the zoning authority. That testimony gave no hint of a private nature or an interest by respondent in being so classified. Respondent's very existence and purpose was heralded as a public benefit—juvenile delinquency would be curtailed, restless youths would be given a playground, and an imperative community recreational need would be satisfied. To now contend that respondent is distinctly private in nature after the benefits of a favored status accorded by the government have been enjoyed since 1958 would cast considerable doubt on respondent's good faith and credibility. We therefore hold respondent has never been distinctly private in nature.

The factor which absolutely convinces us that respondent is a public accommodation is a reading of the Ordinance which expressly covers swimming pools. When the Ordinance was enacted by the County Council in 1962, forty-three community pools were in operation, including respondent. There were no government-operated pools in existence and community pools were the closest to the definition, "public." It would appear that the Council intended such swimming pools to be classified as a public accommodation since such was the holding by the Maryland Court of Appeals before enactment of the Ordinance.



*Drews v. State*, 224 Md. 186, 167 A.2d 341 (1960). If the Council intended to limit the definition of swimming pools to exclude the community pools, an exception could have easily been written into the Ordinance as was the case with taverns. Furthermore, the list of public accommodations could have excluded recreational areas as was the case with the State law. *Maryland Code*, Art. 49B, § 11, *et seq.* Therefore, it is only reasonable to infer from the ordinary meaning of the words used that the Ordinance was intended to cover community swimming pools, the only swimming pools in existence at the time. We hold that respondent is a public accommodation within the meaning of the Ordinance.

## II.

Beyond the technical application of the Ordinance, serious questions concerning the substantive application of the Ordinance have been raised by respondent's particular conduct toward the complainants. The nature of respondent's operation, its government subsidies, open solicitation of Caucasian membership, and the public benefit aspects of its construction and operation give rise to a classification of respondent as a public function under the doctrine of *Evans v. Newton*, 382 U.S. 296 (1966). Therefore, respondent would be subject to the same limitation as the State.

The sale of real estate within the prescribed area contained in respondent's By-Laws is enhanced because of the proximity, accessibility, and advantages incident to a community swimming pool. This factor will allow Caucasians to sell to Caucasians at a premium. Negroes must pay the premium without receiving the corresponding benefits or forego purchase of a house in the prescribed area. The result of this policy deprives the Negro of basic legal rights.

Some pool members are forced, through the inconsistent application of the relatives-only guest policy to limit their



social experiences or forego use of the pool. The result of such an arbitrary standard is to circumscribe and discourage the free associational conduct of these members and also deprives them of basic legal rights.

The full thrust of respondent's policy would tend to discourage Negroes from moving into the prescribed area. In effect, respondent, through its policy of systematic discrimination, has created a racial zoning ordinance without County sanction. These are areas that the public accommodations ordinance is certainly intended to protect and respondent, as public function, may not operate to derogate this intent. It is therefore unlawful for any place of public accommodation in the County to practice racial discrimination in granting membership or admitting guests when guests are so provided by the organization's own regulations. However, in the instant case, it has been demonstrated that respondent received and continues to receive special treatment by the government in the form of tax exemptions, liberal zoning laws, and various other consideration during the initial building stage. These factors tend to impose an even higher standard of duty upon respondent to refrain from practicing racial discrimination.

### III.

The several incidents of alleged racial discrimination are well supported and uncontroverted. A Negro was excluded from the pool as a guest of a bona fide member on the basis of lack of relationship to member. However, Caucasians were admitted with the same lack of membership and told to lie about it. It is clear the family relationship rule and its application was a mere contrivance to exclude Negroes from an otherwise open facility. Such practices are unlawful.

A Negro family applied for pool membership while filling all of the apparent requisites set for Caucasian applicants. Their unexplained exclusion was clearly discriminatory and unlawful.

Several respondent officials published and promoted the racial discrimination policy stated above, also in violation of the Ordinance. It is clear from a total view of respondent's conduct over the years that it has practiced an unlawful and systematic policy of racial discrimination. The respondent was clearly an open facility regarding Caucasian guests and residents. The only restrictions were applied toward the Negro guest and resident.

#### PANEL'S DECISION

And now, May 29, 1969, upon consideration of all the evidence submitted at the public hearing of this case, the finding of fact, and the conclusion of law, the Montgomery County Human Relations Commission Public Accommodation Panel unanimously finds and determines:

1. The Panel has jurisdiction over respondent, over the subject matter of this proceeding, and over the instant complaint.
2. The respondent, Wheaton-Haven Recreation Association, Inc., is a public accommodation as that term is defined in the Ordinance, Sec. 77-9.
3. The respondent has refused, withheld from, and denied to the complainants, solely because of race, the accommodations and advantages of the respondent's community swimming pool, either as members or guests, and consequently respondent has committed and continues unlawful discriminatory practice in violation of the Ordinance, Sec. 77-10.
4. Respondent, operating as a public function and under the Ordinance, cannot promote policies of racial discrimination excluding Negroes to the extent its facilities are available and open to Caucasians.

**FINAL ORDER**

And now, May 29, 1969, upon consideration of the foregoing, and pursuant to Sec. 77-5 of the Ordinance, it is hereby ORDERED:

1. That the respondent, Wheaton-Haven Recreation Association, Inc., its agents, employees and members, shall cease and desist from directly or indirectly refusing, withholding from, or denying to complainants and other persons, because of their race, color, religion, creed, ancestry or national origin, the accommodations and advantages of membership and guest privileges in the respondent community swimming pool facility or the use and enjoyment thereof.

2. That the respondent, Wheaton-Haven Recreation Association, Inc., shall take the following affirmative action which in the judgment of the Panel will effectuate the purposes of the Ordinance.

a. Instruct all its members, officers, managers, and employees, in writing, to comply with the requirements of Paragraph 1 of this Final Order. Copies of such written instruction, signed by all of respondent's officers, managers, and employees, acknowledging receipt and understanding thereof shall be transmitted to the Panel within fifteen (15) days after service of this Final Order.

b. Notify all members of respondent, in writing, that henceforth the policy and practice of respondent will be to serve any guest of a member regardless of his race, religion or national origin and that new members will be considered without regard to race, religion or national origin. A copy of such written communication shall likewise be transmitted to the Panel.

3. Failure to comply with this Order within the specified time will subject the respondent and its officers, jointly and severally, to the liabilities imposed by the Ordinance. This in no way limits the Panel or the Human Relations

Commission from pursuing any of the rights and remedies provided by law.

BY ORDER OF

THE MONTGOMERY COUNTY, MARYLAND,  
HUMAN RELATIONS COMMISSION PANEL  
ON PUBLIC ACCOMMODATIONS

GERALD D. MORGAN, *Chairman*  
DR. THOMAS A. COOK, JR.  
LAWRENCE D. BURKE

**APPENDIX C****Case No. 656****PETITION OF WHEATON-HAVEN RECREATION  
ASSOCIATION, INC.**

(Hearing held August 13, 1958 and August 23, 1958;  
case decided September 20, 1958)

**Opinion of the Board**

This is a petition for a special exception under Section 107-28z-4 of the Zoning Ordinance (Chap. 107, Mont. Co. Code 1955, as amended) to permit the construction and use of a community swimming pool on 4.174 acres, being a part of a tract known as "John Fitzgerald", on the west side of Horde Street, Silver Spring, Maryland, in an R-60 zone.

The petitioner proposes to limit its membership to 325 families. The pool will operate approximately from June 1 to September 1, and will be open during weekdays no earlier than 9 a.m. and no later than 9 p.m. On Sundays, it will open no earlier than 1 p.m. and close no later than 9 p.m.

Exhibit No. 30 is a letter stating that the petitioner agrees to regulate its activities in a specific manner described therein so as not to disturb the members of a nearby Church.

Several residents in the area of the proposed pool appeared at the public hearing in opposition to the petition. Their objections were based primarily on traffic conditions resulting from use of the proposed pool. Considerable evidence was introduced on this point. In connection with this, as well as the objections based on noise, property values and the like, the County Council has provided that with respect to community swimming pools, the following standards, applicable to all other types of special exceptions, shall not govern the decision of the Board:

"(1) The proposed use does not affect adversely the General Plan for the physical development of the

District, as embodied in this Ordinance and in any Master Plan or portion thereof adopted by the Commission; and

"(2) The proposed use will not affect adversely the health and safety of residents or workers in the area and will not be detrimental to the use or development of adjacent properties or the general neighborhood;" (See Section 107-26a(1) & (2)).

The standard which, instead of the above, is applicable in all community swimming pool cases is that "such use will not affect adversely the present character or future development of the surrounding residential community." (See Section 107-28z-4).

The evidence introduced at the public hearing is more than sufficient to sustain a favorable finding with regard to the applicable standard stated above. The record shows that the residential character and future development of the community surrounding the pool will not be adversely affected. The access roadways to and from the proposed pool are not ideal for the purpose involved, but the evidence shows that this is not so severely detrimental as to preclude us from finding that there will be no adverse affect on the present character or future development of the surrounding residential community. (Compare *Petition of Chevy Chase Recreation Association, Inc.*, Case No. 602). We believe, after examining all the evidence before us, that the petitioner has sustained the burden of proof with respect to applicable requirements of Section 107-28z-4. We find, therefore, that they have been met.

The special except for the proposed use, in the manner proposed in the exhibits and testimony, is *granted*.

The Board adopted the following Resolution:

"Be it Resolved by the County Board of Appeals for Montgomery County, Maryland, that the opinion stated above be adopted as the Resolution required by law, as its decision on the above-entitled petition."



The foregoing Resolution was proposed by Mr. Henry J. Bison, Jr., Vice Chairman, and concurred in by Mr. William A. Quinlan, Chairman, constituting all the members of the Board.

EDWERTA B. BARKER

ATN

*Clerk to the Board*

I do hereby certify that the foregoing Minutes were officially entered upon the Minute Book of the County Board of Appeals this 23rd day of September, 1958.

EDWERTA B. BARKER

ATN

*Clerk*

APPENDIX D

POplar 2-6000  
22 South Perry Street  
Rockville, Md.

HENRY J. NOYES  
*Attorney at Law*

July 9, 1970

Mr. Gerald D. Morgan  
Human Relations Commission  
of Montgomery County  
Rockville, Maryland

Re: Wheaton-Haven Recreation Association, Inc.

Dear Sir:

It has come to my attention that you have caused letters to be sent to various private swimming pools, in Montgomery County, including the above named corporation, whom I represent, stating that such pools are public accommodations. You apparently base this allegation on the narrow decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229.

May I refer you to Opinion of the Honorable Edward S. Northrop filed July 8, 1970, in the case of *Tillman, et al v. Wheaton-Haven Recreation Association, Inc., et al*, Civil No. 21294, United States District Court for the District of Maryland. Judge Northrop has held, inter alia, that the *Sullivan* case does not apply to Wheaton-Haven, that Wheaton-Haven is a private club, and may discriminate racially, if its Board of Directors so chooses.

You are hereby notified that any further action by you, either individually, or as a member of the Human Relations Commission, will be considered an invasion of privacy, answerable in damages. Further, I notify you as a member of the panel on public accommodations that all persons act-

28a

ing in concert with you in this regard, including Bertram L. Keys, and your associates on the said panel, will also be asked to respond in damages if you persist in these illegal and unauthorized actions.

Sincerely,

H. J. NOYES  
Henry J. Noyes

HJN:dlp

## TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED .....	2
STATEMENT OF THE CASE .....	2
ARGUMENT .....	7
APPENDIX .....	17

## TABLE OF CITATIONS

### *Cases*

Adickes v. Kress, 398 U.S. 144 .....	4, 7, 10, 14
Bell v. Kenwood Golf and Country Club, 312 F. Supp. 753 .....	7
Bell v. Maryland, 378 U.S. 226 .....	7
Evans v. Newton, 382 U.S. 296 .....	7
Rockville Fuel and Feed v. Board of Appeals, 257 Md. 183 .....	12
Simpson v. County Board of Appeals, 218 Md. 222 ....	10
Smith v. Stinson, 246 Md. 536 .....	2
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 ....	4

### *Supreme Court Rules*

Rule 19 .....	15
---------------	----

### *Federal Rules of Appellate Procedure*

Rule 7 .....	3
Rule 10(b) .....	3
Rule 30(b) .....	3
Rule 30(a) .....	3
Rule 28(e) .....	3
Rule 31(a) .....	3
Rule 40(a) .....	3

	PAGE
<i>Statutes</i>	
42 U.S.C. Section 1981 .....	3
42 U.S.C. Section 1982 .....	3, 4, 5, 14
42 U.S.C. Section 1983 .....	3, 4
42 U.S.C. Section 2000(a) .....	3, 4, 7, 9
1966 Kentucky Acts Chapter 2, Section 402(a)(1)....	7
42 U.S.C. Section 2000(a)(c) .....	10
42 U.S.C. Section 2000(a)(d) .....	10
42 U.S.C. Section 2000(a)(e) .....	10
Montgomery County Maryland Code (1965):	
Sec. 111-37 .....	12
Sec. 111-27 .....	12
Chapter 77 .....	13
<i>Miscellaneous</i>	
30 Montana Law Review 48 .....	7

IN THE  
**Supreme Court of the United States**

---

OCTOBER TERM, 1971

---

No. 71-1136

---

MURRAY TILLMAN, ROSALIND N. TILLMAN,  
HARRY C. PRESS, AND GRACE ROSNER,  
*Petitioners,*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC.,  
BERNARD KATZ, PHILIP S. TRUSSO, SIDNEY N.  
PLITMAN, ANTHONY J. DESIMONE, BRIAN CAR-  
ROLL, ALBERT FRIEDLAND, MRS. ROBERT BEN-  
INGTON, MRS. ANTHONY ABATE, RICHARD E.  
McINTYRE, JAMES V. WELCH, MRS. ELLEN FEN-  
STERMAKER, WALTER F. SMITH, JR., AND JAMES  
M. WHITTLES,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

---

**BRIEF OF RESPONDENTS IN OPPOSITION**

---

The Respondents, with the exception of Richard E. Mc-  
Intyre, separately represented by counsel, respectfully



pray that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case, be denied.

### **QUESTION PRESENTED**

Did the trial Court and the Appellate Court decide this case in ways conflicting with applicable decisions of your Honors?

### **STATEMENT OF THE CASE**

The Statement of the Case, filed by Petitioners, is so incomplete, and lacking in essential points of detail, that the Respondents submit herewith the relevant facts, which have been substantially, if not totally undisputed. Their theory of the case may best be summed up by reference to *Smith v. Stinson*, 246 Md. 536:

"To grossly exaggerate the wrongs, real or imaginary, inflicted by life, has been a preoccupation of mankind, as various writers have pointed out. One tends, said Gabriel Harvey, 'to make huge mountains of small molehills.' Phineas Fletcher mused that 'she takes me for a mountain that am but a molehill.' Said Richard Brome: 'Those people are forever swelling molehills to mountains,' and John Rhode (Cecil John Charles Street) noted in his book 'Dead in the Night', 1942, that 'life is a great one for turning molehills into mountains as the proverb has it.' The contentions of the Appellant singly and cumulatively, are made to sound like mountains of error; when examined closely they are but molehills and non-prejudicial molehills at that."

The facts, as herein stated, are set forth in the various pleadings, and the record of proceedings, before the District Court, as well as the Fourth Circuit Court of Appeals. This Honorable Court will not have the benefit of reading the transcript of proceedings, at the trial Court level, which contain all of the stipulated facts, since the Petitioners have refused to follow the mandatory requirements of the Fed-

eral Rules of Appellate Procedure, regarding inclusion of the typewritten transcript in the record. Their long series of procedural violations consists of a refusal to file a bond for costs on appeal, as required by Rule 7, failure to file and serve on the Respondents a statement of the issues to be presented on appeal, as required by Rules 10(b) and 30(b), failure to include in the appendix, on appeal, either the pleadings or judgment, as required by Rule 30(a), failure to serve on the Respondents a prior designation of the parts of the record to be included in the appendix, as required by Rule 30(b), improper references in the Brief and Reply Brief to evidentiary matter not set out in the appendix, in disregard of Rule 28(e), the late filing of a Reply Brief, in the Fourth Circuit Court of Appeals, without obtaining leave of Court, in violation of Rule 31(a), the late filing of a Petition for Rehearing, in violation of Rule 40(a), and failure to reimburse the Respondents for costs on appeal.

As to the undisputed facts, the Petitioners filed suit in the District Court for Maryland against Wheaton-Haven Recreation Association, Inc., and thirteen of its Directors, hereinafter called Wheaton-Haven, on the basis of several civil rights statutes, i.e., 42 U.S.C., Sections 1981, 1982, 1983, and 2000(a). Tillman, a member of Wheaton-Haven, complained that he is entitled to bring guests to the Wheaton-Haven pool, other than his relatives, although the uniformly applied By-laws limit guest privileges to relatives of members. Rosner claims that she has a contractual right to be a guest of Tillman. Press, who purchased his home in the Wheaton-Haven area, in 1967, with a no down payment G.I. loan, complained that he is entitled to a membership in the Wheaton-Haven pool. It is undisputed that the former owners of the Press home were not members of Wheaton-Haven, and no representation was ever made, at the time of the Press purchase, by anyone, that Mr. and

Mrs. Press were entitled to a membership, or would be afforded a membership, in Wheaton-Haven. There was no indication, at the time of their home purchase, that they even contemplated the purchase of a membership. Press did not seek to obtain an application, from the Board of Directors of Wheaton-Haven, by any formal request, but rather made an informal request to one of the Directors.

Following filing of the suit, the Petitioners' position under Section 1983 was emasculated by *Adickes v. Kress*, 398 U.S. 144, requiring State action as a prerequisite to recovery under this Statute, resulting in quiet abandonment of this portion of the case. At the hearing held before the Honorable Edward S. Northrop, on June 24, 1970, stipulations as to all material facts were made, and all parties agreed that the case should properly be decided on summary judgment. Although the Petitioners have not seen fit to present these stipulations to Your Honors, as contained in the Record, such record would reveal that counsel for the Petitioners conceded that 42 U.S.C., Section 2000(a) did not apply, with his main thrust, both in the District Court, and in the Fourth Circuit Court of Appeals, having been made under 42 U.S.C., Section 1982, and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229. Sullivan interpreted Section 1982 to prohibit a community recreation association from withholding, on the basis of race, approval of an assignment of a membership that was transferred incident to a lease of real property. The structure of the Little Hunting Park Pool Corporation, in *Sullivan*, tied home ownership to pool membership, allowed persons who owned more than one home to purchase more than one membership, and gave such persons the right to assign their membership, along with the disposition of the property. When Sullivan leased his home to Freeman, a Negro, at least a portion of the rent which he was paying included a pool

membership. Based on these facts, this Honorable Court, in a five to three decision, found such conduct a violation of Section 1982.

No such factual contentions, as were presented in *Sullivan*, appear in the instant case. The former owner of the home, purchased by Press, did not have a membership in Wheaton-Haven, and no promise of membership was made. No member has a right to assign a membership. If a member sells his home, he must forward a written resignation to the Association, which must purchase the membership back at Ninety Percent (90%) of the initiation fee, **IF THE ASSOCIATION HAS A WAITING LIST**. If there is no waiting list, which has been the situation with Wheaton-Haven, except for a very brief period, the Board of Directors, may **AT ITS OPTION**, repurchase the membership for Eighty Percent (80%) of the initiation fee. The selling member must forward a written resignation to the Association, and the purchaser of the home, who makes a formal written application for membership, within a reasonable period, shall have the first option to purchase the membership of the seller, subject to the approval of the Board of Directors. The first option of the home purchaser is not created until there has been a repurchase by Wheaton-Haven. Although the Petitioners attempt to create a right to a membership out of this pure expectancy, this provision of the Wheaton-Haven By-laws played no part in the development of this case, since Press makes no contention that he was denied the right to purchase the membership of a former member. He simply asks the Court to rule that he is entitled to purchase a membership. The applicable provision of the By-laws is as follows:

**"Article VI — Resignation of Membership**

A member in good standing who wishes to resign from the Association shall inform the Secretary in

writing of his decision. If the Association has a waiting list, the Board of Directors shall repurchase the membership with funds provided by the resale of the membership by refunding not less than ninety per cent (90%) of the initiation fee in effect at the time of resignation, less any deficit assessments covering any periods of operation during which he was an active member, and annual dues or special assessments due the Association; provided, however, that if the resignation is to become effective before the swimming season opens, he shall not be liable for payment of annual dues for the next swimming season. If no waiting list exists, the Board of Directors may, at its option, repurchase the membership for eighty per cent (80%) of the initiation fee in effect at the time of the resignation, less amounts due the Association as outlined above. The procedure with respect to members who are dropped from the rolls by appropriate action of either the Board or the membership shall be the same as set forth herein for members who resign. In any case where a member sells his property, the purchaser thereof may have the first option to purchase the membership of the seller solely from the Association at a rate equal to the initiation fee in effect at the time of the sale; provided, however, that the seller forwards a written resignation to the Association, and the purchaser makes a formal written application for membership to the Board of Directors within a reasonable period. Such membership application shall be subject to the approval of the Board of Directors."

Both the trial Court and the Appellate Court found Wheaton-Haven to be distinctly private, that *Sullivan* did not apply to the facts in this case, and that neither the Civil Rights Acts of 1866 or 1964 were applicable. First roundly defeated in the trial Court, now smitten by the Appellate Court, the Petitioners undaunted, bring their molehill to the highest Court in the land.



## ARGUMENT

### THE DECISIONS OF THE LOWER COURTS STAND FOUR SQUARE WITH APPLICABLE STATUTES AND CASE LAW.

It is notable that this Honorable Court, in *Sullivan, supra*, did not find the Little Hunting Park pool to be a public accommodation under Section 2000(a). The Constitutional right of Wheaton-Haven to make membership selections on the basis of race, in its status as a private club, has been consistently recognized. *Evans v. Newton*, 382 U.S. 296; *Bell v. Maryland*, 378 U.S. 226; *Adickes v. Kress, supra*. The Respondents suggest that 1966 Kentucky Acts, Chapter 2, Section 402(a)(1) appears to set forth generally recognized guidelines:

"A private club is not a place of public accommodation if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests."

Those cases and treatises which have attempted to meet the problem, have usually set forth the proposition that no one factor is controlling. Indeed, in finding that the Kenwood Club, in *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753, was a place of public accommodation, the Court stated "absence of self-government is not fatal to a claim that an organization is a private club." The suggested definition in 30 Montana Law Review 48, "Public Accommodations, What is a Private Club?", sets forth the generally accepted criteria:

1. Formed because of a common associational interest among the members.
2. Carefully screens applicants for membership and selects new members with reference to the common intimacy of association.



3. Limits the facilities or services of the organization strictly to members and their bona fide guests.
4. Control by the membership in general meetings.
5. Limits its membership to a number small enough to allow full membership participation and to insure that all members share the common associational bond.
6. Non-profit and operated solely for the benefit of the members.
7. Publicity, if any, is directed only to members for their information.

The stipulated facts, which have not been made available to Your Honors, indicate that Wheaton-Haven meets every single test set forth in this definition.

1. In 1958, a group of private citizens purchased a parcel of land, with their own funds, and formed a non-profit corporation. They were motivated by a common associational interest in building a swimming pool for their own use. "The purpose of the association shall be to own, construct, develop, operate, maintain and manage suitable facilities for the safe and healthful recreation of the association's members, said facilities to include a swimming pool, and such other facilities as the association may deem desirable" (By-laws, Article II).

2. Membership is not limited to home owners (Article III, By-laws), and, for all practical purposes, is not limited to any specific geographical area. At any regular meeting, a majority of the members, by an affirmative vote, may elect a person to membership, or, such membership may be obtained through the Board of Directors.

3. The facilities are limited to three hundred twenty-five family units, and relatives of members.

4. The corporation is controlled by its members, in that the By-laws (Article IX), require an annual meeting with at least twenty days notice to each member. The members may nominate Directors from the floor, and may bring business before the annual meeting, provided sufficient advance notice is given to the Board. Special meetings may be called, upon the request of twenty percent of the members. Ten percent of the family units, being a maximum of thirty-three members, constitutes a quorum. Amendment of the By-laws (Article XV) may be accomplished by the members, or the Board of Directors, subject to final approval of the members.

5. The Petitioners have never challenged the fact that Wheaton-Haven is non-profit and operated solely for the benefit of its members.

6. Wheaton-Haven engages in no publicity whatsoever. It maintains a sign, on its premises, for the benefit of its members, giving the number where information may be obtained.

The Petitioners place great significance on the dicta, in the *Sullivan* case, wherein Your Honors said:

"The Virginia trial Court rested on its conclusion that Little Hunting Park was a private social club. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographical area, there being no selective element other than race."

In spite of its finding that Little Hunting Park was not private, this Honorable Court did not find that the pool corporation was a public accommodation within the ambit of 42 U.S.C. Section 2000(a). Indeed, the stipulated facts, as to Wheaton-Haven, indicate that its activities place it squarely within the statutory exemption of Section 2000

(a)(e). The only remote classification within which the Wheaton-Haven pool could fall would be "a place of exhibition or entertainment", as contemplated by Section 2000(a)(b). Although it is not conceded that the Wheaton-Haven pool falls into this category, the additional requirement of Section 2000(a)(c) that "it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce" bars recovery under this Section. Further, the "State action" required by Section 2000(a)(d) applied in *Adickes v. Kress, supra*, is totally lacking, as was tacitly conceded by counsel for the Plaintiffs-Appellants, at the hearing before the District Court Judge and as would appear in the transcript, if contained in the record.

The Respondents, as well as Montgomery County, Maryland in its Amicus Curiae Brief, seem to imply that the required zoning under which the Wheaton-Haven swimming pool was constructed, known as a special exception, imports a continuing privilege granted by Montgomery County, Maryland. This special exception was granted by the Board of Appeals of Montgomery County, on September 23, 1958 following a public hearing, pursuant to Section 107 of the Montgomery County Code, 1965 edition as amended. It was granted under the precise Section of the Code as was the special exception granted to a nearby pool, in Montgomery County, known as North Chevy Chase Swimming Pool Association, Inc. The granting of the latter special exception was the subject of an appeal to the Court of Appeals of Maryland, on Constitutional grounds, in *Simpson, et al. v. County Board of Appeals*, 218 Md. 222, decided November 19, 1958, less than two months after the granting of the special exception to Wheaton-Haven. In that case, the Maryland Court of Appeals recognized the

privacy of community swimming pools, authorized by the Montgomery County Code, saying:

"The association is a *private, non-profit, membership corporation*, which was incorporated for the purpose of constructing and operating a swimming pool and other related facilities."

The identical standards, required of the North Chevy Chase pool, were required of, and met by the Wheaton-Haven pool, in fitting the definition of community swimming pools, as presently set forth in Section 111-2 of the Montgomery County Code, 1965 edition as amended:

*"Swimming Pool, Community.* A swimming pool or wading pool, including buildings necessary or incidental thereto, operated by members of more than ten families for the benefit of such group and not open to the general public, whether incorporated or unincorporated, whether organized as a club or cooperative or association; provided that it is not organized for profit and that the right to use such pool is restricted to such families and their guests."

The definition of community swimming pools is entirely compatible with the definition of private club, also set forth in Section 111-2, Montgomery County Code:

*"Private Club.* An incorporated or unincorporated association for civic, social, cultural, religious, literary, political, recreational, or like activities, operated for the benefit of its members and not open to the general public."

The two uses are basically the same, as to organization, operation, member control, and lack of profit motive, but differ in that community swimming pools must meet stringent requirements, not required of a private club, for the protection of the general neighborhood (*Infra*).

An applicant for a community swimming pool must meet the requirements of Section 111-37 of the Montgomery County Code, 1965 edition, in that such applicant must prove, by a preponderance of the evidence, that such use will not affect adversely the present character or future development of the surrounding residential community, that certain specific set-backs are met, that a public water supply shall be available or that use of a private water supply will not affect adversely the water supply of the community, that certain screening requirements are met, that one parking space is provided for every seven persons lawfully permitted in the pool at one time (Section 111-27), and that special conditions may be added for the general welfare of the community, such as additional parking, additional fencing or screening, additional set-backs, location and arrangement of lighting, and a showing of financial responsibility. Once the requirements are met, a property owner has a prima facie right to enjoy a special exception. If there is no probative evidence of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious, and illegal. *Rockville Fuel and Feed v. Board of Appeals*, 257 Md. 183. Wheaton-Haven met its burden, resulting in the granting of the special exception without additional conditions, which was not appealed, and is presumed to be valid and correct. *Rockville Fuel and Feed v. Board of Appeals*, *supra*. The fact that Montgomery County requires a special exception to be obtained, before a community swimming pool may be constructed, is not controlling, since a special exception is likewise required for a public swimming pool, defined also in Section 111-2 of the Montgomery County Code, as follows:

**"Swimming Pool, Commercial.** The swimming pool or wading pool, including buildings necessary or inci-



dental thereto, open to the general public and operated for profit."

Conversely, a special exception is not required for a small, private pool, defined as follows:

*"Swimming Pool, Private.* A swimming pool owned by members of not more than ten families and used by no one other than members of such families and their guests."

Indeed, then, the status of Wheaton-Haven, as to its public or private character, is determined by its structure and operation, rather than its label, as assigned by the local zoning ordinance. The Respondents submit that Wheaton-Haven has done everything, within its power, and within the framework of applicable laws and ordinances, to establish a genuinely private club, from the very day of its formation.

Montgomery County, Maryland lends great weight to the fact that an administrative body, on May 29, 1969, known as the Montgomery County Commission on Human Relations, found that Wheaton-Haven was a public accommodation. The proceedings conducted by this Commission were held under the authority of Ordinance 4-120, enacted in 1962, and codified as Chapter 77, Montgomery County Code, 1965. Montgomery County well knows that this Ordinance, which was enacted without legislative authority, was held to be unenforceable as a matter of law, by the Circuit Court for Montgomery County, Maryland, on September 12, 1969 (See Appendix A). This case, which was not appealed by Montgomery County, renders the proceedings before the Montgomery County Human Relations Commission a nullity. The Respondents submit that these were administrative proceedings, before laymen, and do not have the force of law, even had they not been declared void.



## CONCLUSION

This case illustrates the "inevitable difficulties" surrounding the use of Section 1982, as was recognized by the dissent in the *Sullivan* case.

"The majority's complete failure to articulate any standards for deciding what is property for Section 1982 is a fair indication of the great difficulties Courts will inevitably confront if Section 1982 is used to remedy racial discrimination in housing. And lurking in the background are grave Constitutional issues should Section 1982 be extended too far into some types of private discrimination. Not only does Section 1982 fail to provide standards as to the types of transactions in which discrimination is unlawful, but it also contains no provisions for enforcement, either public or private \* \* \* The undiscriminating manner in which the Court has dealt with this case is both highlighted and compounded by the Court's failure to face, let alone resolve, two issues which lie buried beneath the surface of its opinion. Both issues are difficult ones, and the fact that the majority has not come to grips with them serves to illustrate the inevitable difficulties the Court will encounter if it continues to employ Section 1982 as a means for dealing with the many subtle problems that are bound to arise as the goal of eliminating discriminatory practices in our national life is pursued."

In bringing this appeal, the Petitioners refuse to recognize the polar propositions set forth in *Adickes v. Kress, supra*. They ask Your Honors, in effect, to rule that all swimming pools, even though purchased and constructed with private funds, even though member-controlled, even though non-profit, even though organized for the use of members and their guests, must, if constructed within a given community, whatever the definition of community may mean, open their doors to all members of the Negro race, while white persons may be denied membership, and

admission as guests, for any reason, however frivolous. Wheaton-Haven suggests unto Your Honors that such a conclusion would effectively eliminate the word private from the English language. It is entirely conceivable, and could ultimately follow from such an unfortunate decision, that a homeowner, owning a swimming pool, in his backyard, with a white neighbor on one side, and a Negro on the other, could be required to accept the Negro as a guest in his pool, or respond in damages. Wheaton-Haven is known as a community swimming pool, only because a specific zoning category, under which it was constructed, is so labeled. A number of people, banding together in Montgomery County, Maryland, for the construction of a private swimming pool, *must* obtain such special exception, known as a community swimming pool, as a pre-requisite to construction. It must be conceded, by the Petitioners, that organizations exist which are distinctly private. This being the case, the Respondents thus query, "If Wheaton-Haven is not private, what more could have been done to meet the test of privacy?" The members may, by a majority vote, as authorized by the By-laws, voluntarily accept a Negro as a member, still maintaining their integrity and intimacy as a private club. The Petitioners now attempt to assert the right of Negroes to be guests, while conceding that white persons do not have such right, attempt to assert the right of Negroes to be members, while conceding that white persons do not have such right, and thus ask this Honorable Court to judicially terminate the existence of private associations.

In praying for a Writ of Certiorari, the Petitioners bring nothing of a startling nature, before this Honorable Court, and present nothing which would merit consideration, as outlined in Rule 19 of the Supreme Court Rules. There are obvious and substantial factual differences between the

**Sullivan case, so heavily relied on by the Petitioners, and the instant case. There are literally thousands of small community pools, throughout the Country, with well over one hundred being in the Washington-Metropolitan Area, and with many and varied types of operation. Not satisfied with the determination of the District Court Judge, and the Fourth Circuit Court of Appeals, that Wheaton-Haven is distinctly private, with a Petition for rehearing having been considered and denied by a majority of the Appellate Bench, the Petitioners now ask Your Honors to analyze the structure of this one small isolated pool, to determine if it is in fact private. The Petitioners have been granted a full measure of justice, in spite of the fact that they have consistently defied the procedural rules, with impunity. It is respectfully prayed that the Petition for Writ of Certiorari be denied.**

**Respectfully submitted,**

**HENRY J. NOYES,**

**Attorney for Respondents.**

## APPENDIX

In The  
Circuit Court for Montgomery County, Maryland

No. 36124 Equity

Montgomery County, Maryland,

Plaintiff,

v.

Herman Elliott,

Defendant.

## OPINION AND ORDER

Montgomery County, the Plaintiff herein, prays for a mandatory injunction compelling the Defendant, a barber shop operator, to comply with the County Public Accommodation Ordinance, Ordinance 4-120, now a part of Chapter 77, *Montgomery County Code*, 1965.<sup>1</sup> The County claims

<sup>1</sup>"Article II. Discrimination in Places of Public Accommodation. Sec. 77-8. Statement of policy.

It is hereby declared to be the public policy of the county that discrimination in places of public accommodation against any person on account of race, color, religion, ancestry or national origin is contrary to the morals, ethics and purposes of a free, democratic society; is injurious to and threatens the peace and good government of this county; is injurious to and threatens the health, safety and welfare of persons within this county; and is illegal and should be abolished. It is further declared that this article is intended to apply and shall apply to all places of public accommodation in this county, whether or not such places are listed in section 77-9 of this Code, except as otherwise expressly provided. \* \* \*

Sec. 77-9. Applicability of article.

This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall

that the Defendant violates the Ordinance by refusing to serve patrons on account of their race.

In accordance with the provisions of the Ordinance, the County's Human Relations Commission Panel on Public Accommodations has previously held a hearing and found that the Defendant committed unlawful discriminatory practices in the operation of his barber shop. It is alleged here that the Defendant has refused to comply with the Panel's order that he cease and desist from engaging in his discriminatory practices.

The Defendant demurs to the Bill of Complaint upon several grounds. In the view which the Court is obliged to take of this case, it shall be necessary to consider but one of those grounds. The Defendant contends that the Ordinance is void *ab initio* in that it is distinctly legislative in nature under the test enunciated by the Court of Appeals in *Scull v. Montgomery Citizens League*, 249 Md. 271, 239 A. 2d 92 (1968), but was enacted in executive rather than legislative session.

The thrust of the County's argument in opposition to the demurrer is that, under the *Scull* test, the Ordinance was

apply and be applicable to every place of public accommodation, \* \* \* whose facilities, accommodations, ~~services~~, commodities or use are offered to or enjoyed by the general public, either with or without charge, and shall include, but not be limited to, the following types of places, among others: \* \* \* service establishments; \* \* \*.

Sec. 77-10. Prohibited acts.

It shall be unlawful for any owner, lessee, operator, manager, agent or employee of any place of public accommodation, resort or amusement within the county:

(a) To make any distinction with respect to any person based on race, color, religion, ancestry or national origin in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

\* \* \* \* \*



not legislation since it merely codified the common law innkeepers rule, and did not promulgate a "new plan or policy." Thus, the County contends, the subject matter of the Ordinance was amenable to executive action in an effort to "implement or administer" the otherwise prevailing common law rule.

In *Scull*, the Court of Appeals addressed itself to the problem created by the dual nature of the Montgomery County Council, which constitutes both the executive and legislative branches of the county government. Interpreting the Montgomery County Charter and the Express Powers Act, the Court distinguished between actions by the County Council which are essentially legislative and those which are essentially executive. Action by the County Council which prescribes a new plan or policy of general application is essentially legislative and may be validly enacted only while sitting in legislative session during the month of May (now from January 5 to February 3 of each year). On the other hand, action by the County Council which "merely looks to or facilitates the administration, execution or implementation of a law already in force and effect" is essentially executive and may be validly promulgated while sitting in executive session. 249 Md. at 282, 239 A. 2d at 98 (emphasis supplied). The Court concluded that distinctly legislative ordinances adopted by the County Council in executive session are "null and void." *Id.* at 284.

Since the same representative body, the County Council, sits as both the executive and the legislature, there may appear — at least superficially — to be little need to delineate the respective powers of each. Nonetheless, the Maryland "home rule" legislation and the Montgomery County Charter each contribute significant reasons why such a delineation is essential.



First, Article XI-A of the Constitution of Maryland, which is the backbone of "home rule" in this State, specifically requires that a county council may enact legislation only during a time period specified in the county charter, not to exceed forty-five days per year. As the Court noted in *Scull*, "Section 3 of Art. XI-A requires [that there be] a charter provision for 'an elective legislative body in which shall be vested the law-making power' of the County." Moreover, "[t]he Charter must [provide that]: '\* \* \* all legislation shall be enacted at the times so designated for that purpose \* \* \*.'" 249 Md. at 278, 239 A. 2d at 95-96 (emphasis in original). These constitutional restrictions were part of the political settlement under which "home rule" was first obtained in 1915. As the Court of Appeals stated in *Schneider v. Lansdale*, 191 Md. 317, 327, 61 A. 2d 671, 675 (1948) and adopted in *Scull*, 249 Md. at 275, 239 A. 2d at 94, "[t]hose who framed the amendment were fearful of a lawmaking body in continuous session and therefore the new authority to legislate was carefully restricted."

Second, the Montgomery County Charter complies with these Maryland constitutional requirements and in addition provides for popular referendum. As the Court noted in *Scull*, "Section 3 [of Article II of the Charter] 'General legislative powers,'" reads:

"The county council is the elective legislative body of the county and is vested with the law-making power thereof \* \* \*." *Scull*, 249 Md. at 278, 239 A. 2d at 96. (emphasis supplied).

Similarly, as the Court there noted, "Article II, Sec. 1, makes the Council 'in legislative session' the body in which is vested exclusively the law-making power of the County \* \* \*." 249 Md. at 281, 239 A. 2d at 97 (emphasis supplied). Consequently, although "the executive branch of county

government shall be composed of the county council in executive session" (Art. III, §1), Section 3 provides that "[t]he county council shall have power in executive session to: (a) Exercise all powers, except powers to enact legislation \* \* \*." *Scull*, 249 Md. at 278-80, 239 A. 2d at 97 (emphasis supplied). Additionally, Article II, §6(a) of the Montgomery County Charter specifically provides that:

"The people of Montgomery County reserve to themselves the power by petition to have submitted to the registered voters of the county for approval or rejection by them \* \* \* any public local law \* \* \*."

Since the County Council in legislative session is vested exclusively with the power to enact "public local laws," only ordinances enacted in legislative session are subject to the right to petition for referendum. Consequently, the promulgation of distinctly legislative ordinances while the Council is sitting in executive session not only violates the Maryland Constitutional delegation of authority to the County, but also deprives the people of a right to petition for referendum.

In delineating the scope of the Council's powers in executive and legislative session, the Court of Appeals adopted a "recognized test": An ordinance is subject only to legislative enactment, the Court said, if it " \* \* \* is one making a new law — an enactment of general application prescribing a new plan or policy \* \* \*." *Scull*, 249 Md. at 282, 239 A. 2d at 98. Conversely, an ordinance may be adopted in executive session only if it " \* \* \* is one which merely looks to or facilitates the administration, execution or implementation of a law already in force and effect." *Id.* (emphasis supplied).

The case at bar does not pose any question regarding the substance or constitutionality of Public Accommodations

*Ordinance 4-120*. The primary question presented is the propriety of the mode of enactment of *Ordinance 4-120* as evaluated under the test announced in *Scull*. In particular, the issues raised are whether the common law innkeeper rule operates so as to proscribe racial discrimination by barbers and, if it does, whether the *Scull* test is satisfied by the County's "implementation" of a common law rule.

At common law, private businesses were generally allowed to refuse to deal with anyone for any reason. As early as 1460, however, the general rule was altered in the case of an innkeeper, so that "[i]f I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him \* \* \*." *Anonymous*, Y.B. 39 H. VI 18.24 (1460) (Moile, J.); 3 Blackstone, *Commentaries* 166 (Lewis ed. 1902); Storey, *Commentaries on the Law of Bailments*, §§475, 590-91 (9th ed. 1878); see generally Tidswell, *The Innkeepers Legal Guide* (1864). The adoption of the English common law by the American States brought with it the common law innkeeper rule, so that it has been generally recognized that the rule applies in virtually all of the states. E.g., see, *Heart of the Atlanta Hotel, Inc. v. United States*, 379 U.S. 241, 261 (1964); *Civil Rights Cases*, 109 U.S. 3, 25 (1883) (Bradley, J.). In particular, the Maryland Court of Appeals has acknowledged the applicability of the common law innkeeper rule in Maryland. *Barnes v. State*, 236 Md. 564, 576-77, 204 A. 2d 787, 794 (1964); *Drews v. State*, 224 Md. 186, 191, 167 A. 2d 341, 343 (1961).

Most of the American cases discussing the common law innkeeper rule may be divided into two categories: those involving constitutional challenges to civil rights legislation, e.g., *Heart of Atlanta Motel, Inc. v. United States*, *supra*; *Barnes v. State*, *supra*, and those involving an attempted application of the innkeeper rule to a particular

type of "public accommodation", e.g., *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D. Md. 1960) (restaurant); *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E. 2d 697, 1 A.L.R. 2d 1160 (1947) (race-track); *Drews v. State*, *supra* (amusement park); *Greenfield v. Maryland Jockey Club*, 190 Md. 96, 57 A. 2d 335 (1948) (racetrack); *Bowlin v. Lyon*, 25 N.W. 766, 67 Iowa 536 (1885) (skating rink). In the former group, the innkeeper rule found gratuitous approval in the context of showing that modern civil rights legislation has ancient roots.<sup>2</sup> In the latter group, the innkeeper rule formed the basis for relief but was rejected as inapplicable to the particular activity involved. Although none of these cases actually applied the common law innkeeper rule to prohibit racial discrimination by innkeepers, or anyone else, the opinions in each of the cases approve such an application in dicta.

Even though the rule may proscribe racial discrimination, it has not usually been interpreted as applying to all types of "public accommodations". (See cases cited above.) The policy underlying the innkeeper rule is one of public necessity. Inns were and are essential for public travel, and, in ancient England, as in some parts of the United States today, they were "few and far between". "The traveler would be at the mercy of the innkeeper, who might practice upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night." Wyman, *The Law of Public Callings as a Solution to the Trust Problem*, 17 Harv. L. Rev. 156, 159 (1903). Since the otherwise prevailing common law rule was that the proprietor

<sup>2</sup> In Justice Goldberg's concurring opinion in *Bell v. Maryland*, 378 U.S. 226, 299-300 (1964), the common law innkeeper rule formed part of the basis for arguing that the 14th Amendment was intended to place an affirmative duty upon the states to eliminate racial discrimination in public accommodations.

of a private business had absolute power to choose his customers, e.g., *Madden v. Queens County Jockey Club*, *supra*, courts have strictly interpreted the coverage of the innkeeper rule. The English courts have applied the rule to persons providing lodging to transient guests (innkeepers), common carriers, and blacksmiths. See discussion in *Jackson v. Rogers*, 2 Show. 237 (1683) (Jeffries, C.J.). American courts have been equally restrictive in defining the scope of the rule. The prevailing American rendition of the rule applies it to innkeepers and common carriers.<sup>3</sup> E.g., *Barnes v. State*, *supra*. Although there might be a question as to its application to barber shops, there is some support for the view that the common law rule applies to all types of public facilities licensed by law. See *Bell v. Maryland*, *supra*; but cf. *Drews v. State*, *supra*.

Regardless of the scope of the innkeeper rule, it is clear to this Court that the County Council sitting in its legislative capacity, does have the authority to enact a public accommodations law. This legislative authority is not diminished by the fact that the law so enacted merely "implements" or "codifies" a common law rule. The legislative branch has always had the power to modify or codify the common law. *Lutz v. State*, 167 Md. 12, 15, 172 A. 354, 356 (1934). The ordinance here in question, however, was passed in executive session.

Therefore, the central and dispositive issue in this case is whether the County Council may utilize its executive powers to "implement and administer" a common law rule. Ordinance 4-120 must be evaluated in terms of the scope of the Council's executive powers as they are enumerated in

---

<sup>3</sup> One can speculate that the rule ought to apply to service stations since they are the modern equivalent of blacksmiths, and they are most certainly heirs to the same degree of public necessity which brought blacksmiths under the rule.



*Montgomery County Charter*, Article III, Section 3, and interpreted by the Court of Appeals in *Scull*. It is upon this basis which we are compelled to find that the County Council, sitting in its executive capacity, has no power or authority to "implement or administer" a common law rule. Because of this conclusion, we need not now decide whether the common law innkeeper rule may be utilized to prevent racial discrimination in public accommodations and, if so, whether it applies to barber shops.

The County Council in executive session has no authority to "implement" common law rules because such implementation violates the rule announced in *Scull*. The Court said in *Scull* that the Council's executive power may be used to implement or administer "a law already in force and effect". The County here argues that "a law" includes the common law. The Court in *Scull* made it irrefutably clear that by "a law" it meant an ordinance enacted by the County Council in legislative session. As the Court stated:

"\* \* \* the Council in executive session \* \* \* may implement and facilitate and insure the proper execution of laws and ordinances passed by the Council in legislative sessions \* \* \* as the County Commissioners could have done in regard to public local laws passed by the General Assembly. That the Council in executive session is to have no power to make law as such is made clear by and emphasized in various provisions of the Charter." *Scull*, 249 Md. at 281, 282, 239 A. 2d at 97-98 (emphasis supplied).

Moreover, in formulating the legislative-administrative test which it announced in *Scull*, the Court relied on and cited *Vanmeter v. City of Paris*, 273 S.W. 2d 49, 50 (Ky. 1954). See *Scull*, 249 Md. at 282-83, 239 A. 2d at 98. In *Vanmeter* the Court of Appeals of Kentucky stated:

"\* \* \* the rule is that the power to be exercised is legislative if it prescribes a new policy or plan, and is



administrative if it merely pursues a plan already adopted by the [municipal] legislative body or some power superior to it [such as the state legislature]." 273 S.W. 2d at 50 (emphasis supplied).

In addition, the Supreme Court of California has had occasion to state that: "\* \* \* if the action be designed merely to carry into effect a law already enacted it may be said to be administrative rather than legislative action." *Kleiber v. City and County of San Francisco*, 117 P. 2d 657, 659, 18 Cal. 718 (1941) (emphasis supplied).

Finally, the Court of Appeals said in *Scull* that "[i]f an ordinance brings into being a law as distinguished from ordaining an implementation or the administration or execution of an existing law, it must be passed at a legislative session of the council." 249 Md. at 284 (emphasis supplied).

From these statements of the rule it is inescapably clear that *Scull*, which is controlling here, limits the executive power of the County to the implementation of legislative enactments. Therefore, the Council may not utilize its executive power to implement a common law rule.

One of the foundations of our democratic institutions is the doctrine of separation of powers. In Maryland, this philosophical principle has been crystallized into a constitutional provision. Article 8 of the Declaration of Rights of the Constitution of Maryland provides:

"That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

The policy underlying this provision has been applied in situations involving executive encroachment upon judicial authority. In *Hoke v. Lawson*, 175 Md. 246, 257 (1938), the

Court of Appeals was faced with the question of whether an agreement by a police commissioner regarding the application of a Maryland Gambling law would prevent the court from enjoining certain gambling activities. The Court there noted that "there is in our system no such relation between the courts and the administrative officials as would render agreements by the latter effective to preclude the ordinary action of the courts in applying the law as they find it." Similarly, in *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860), the Supreme Court of the United States in interpreting Article IV, Section 2 of the United States Constitution (fugitive extradition clause), concluded that a governor could not demand that a sister state deliver a fugitive "unless the party was charged in the regular course of judicial proceedings". The Court based its decision upon its view that:

"[A]ccording to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department." *Id.* at 104.

As these cases indicate, the judiciary has always had exclusive jurisdiction to interpret and apply the common law. Only legislative authority may be exercised so as to codify or modify a common law rule. As the Supreme Court noted in *Munn v. Illinois*, 94 U.S. 113, 134 (1875), "the common law \* \* \* may be changed at the will, or even at the whim, of the legislature \* \* \*, [i]ndeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances" (emphasis supplied). The Court of Appeals has

long adhered to the principal that the legislature may modify or codify the common law. See *Lutz v. State*, *supra*. However, unless the common law has been changed by legislative action, it is the duty of the *judiciary* to interpret and apply the common law in Maryland. *Damasiewicz v. Gorsuch*, 197 Md. 417, 439-40, 79 A. 2d 550, 560 (1951). Consequently, *Ordinance 4-120*, even if it merely codified a common law rule, was amenable to legislative process only and, as the product of the county's executive authority, is null and void.

In an effort to overcome the defects of *Ordinance 4-120*, the County makes several additional arguments: First, the County contends that any defect in *Ordinance 4-120* was cured through the enactment of Bill No. 1, Chapter 1 on May 10, 1966, by the County Council. Bill No. 1 provides:

"Be it enacted by the County Council for Montgomery County, Maryland, that — Sec. 1. The Montgomery County Code 1965, published under the supervision of the County Attorney, be and the same is hereby legalized and made prima facie evidence of the following manners therein contained; a. All local laws \* \* \*."

The County contends that by "legalize" the Council meant to adopt anew all local laws contained in the Code.

Although Bill No. 1, Chapter 1 might be viewed as a "legislative enactment", any fair interpretation of the County's Charter requires that the Council not be permitted to distort the prescribed legislative process. One of the effects of enactment of a "public local law" by legislative process is the right of the people to petition for referendum. Montgomery County Charter, Article II, §6(a). By enacting *Ordinance 4-120* in executive session, that right was avoided. Similarly, because of Bill No. 1's clear purpose (to cure minor publishing or enactment defects)

and its broad, equivocal language, it provides little or no effective notice to the populace that any new substantive plan or policy is being "authenticated". In short, Bill No. 1 does not serve sufficiently to apprise the voters of their right to petition for a referendum on the Public Accommodations Ordinance.

Moreover, a codifying act as broad as this one could not be interpreted as manifesting the Council's intent to re-enact Ordinance 4-120. Such overly broad "curative" enactments are ineffective to constitute re-enactment of specific legislation. See *Certain Lots Upon Which Taxes Are Delinquent v. Monticello*, 31 So. 2d 905, 159 Fla. 134 (1947). In fact, overly broad curative enactments have been treated as unconstitutional. E.g., *Town of Davie v. Hartline*, 199 So. 2d 280 (Fla. 1967); cf. E. McQuillin, 5 Municipal Corporations, Section 16.94 at 341 (3d ed. 1949). Similarly, in *Havre de Grace v. Bauer*, 152 Md. 521, 527, 137 A. 344, 346 (1927) the Court of Appeals held that a legislative adoption and approval of minutes which inaccurately recorded that a resolution had passed did not validate or legitimize the bill because there is no intent when voting on such "procedural" motions to approve substantive legislation. As these cases indicate, Bill No. 1, Chapter 1, did not constitute a legislative enactment of Ordinance 4-120.

Second, the County argues that the Supreme Court's interpretation of the Equal Protection Clause in *Hunter v. Erickson*, 37 U.S.L.W. 4091 (Jan. 20, 1969), requires that the County Council be permitted to enact civil rights ordinances while sitting in executive session. In *Hunter v. Erickson*, *supra*, the Court dealt with an amendment to the Akron City Charter which provided that local fair housing ordinances become effective only after their approval by a majority vote of the people. In other words, the amendment singled out housing regulations, "based on race" for

mandatory referendum, rather than the otherwise prevailing right of the people to petition for referendum. As the Court said, the Akron amendment constituted "an explicitly racial classification treating racial housing matters differently from other racial and housing matters". 37 U.S.L.W. at 4092.

The County's contention that in the case at bar, " \* \* \* we have an analogous situation wherein the County Council can regulate places of business [etc.] \* \* \* through \* \* \* building regulations; etc. without the enactment of a local law \* \* \*" is untenable. The flaw in the "analogy" is that neither the Montgomery County Charter, the Express Powers Act, nor the test enunciated in *Scull* attempt to single out "racial" topics for special procedures. The *Scull* distinction between implementation of existing laws and enactment of new policies applies equally to racial and non-racial topics.<sup>4</sup>

Third, the County contends that racial discrimination in public accommodations is a "badge of slavery" which is forbidden by the 13th Amendment. To be sure, racial discrimination is a "badge of slavery". *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445-46 (1968) (Douglas, J., concurring). And, racial discrimination in public accommo-

---

<sup>4</sup> One might argue, which the County does not, that the "old-new" distinction created by *Scull* tends to thwart the passage of local civil rights laws; since most civil rights legislation would be categorized as a "new policy," it requires a legislative enactment subject to referendum, whereas the remnants of "Jim Crowism" are "old" policies along with other matters not imbued with "racial" consequences and are thus amenable to executive action. Nonetheless, the problems with this argument are several: (A) It at least goes far beyond the holding of *Hunter v. Erickson* regarding special procedures for racial matters, and probably goes beyond any future application of *Hunter*. (B) it presents an inaccurate picture of the existing legislation. Jim Crow legislation has been largely eliminated and is subject to direct attack under the 14th Amendment, and several civil rights enactments have found their way into the category of "old or existing law".



dations in particular imposes such a badge.<sup>5</sup> However, the 13th Amendment has not been interpreted as a self-executing prohibition of all such "badges". In the *Jones* case, both the Court and Justice Douglas concurring agreed that the issue was whether Congress had the power to enact a "fair housing" law (42 U.S.C. §1982) which would proscribe purely private discrimination. See 392 U.S. at 439 (majority opinion); 392 U.S. at 444 (concurring opinion). In finding that the 1866 law did and could apply to purely private discrimination (i.e., without relying on either the 14th Amendment or the interstate commerce clause), the Court relied upon the power of Congress under Section 2 of the 13th Amendment "to enforce this article by appropriate legislation."

The *Jones* case stands for the power of Congress under Section 2 of the 13th Amendment, not for the self-executing coverage of Section 1 of the 13th Amendment. No court has ever held that the 13th Amendment by itself proscribes all "badges of slavery". See E. S. Corwin, *The Constitution of the United States of America*, 1063-65 (1964 ed.). For these reasons, the County's 13th Amendment argument is also inapposite.

Fourth, the County argues that the right to be free of racial discrimination by private businesses serving the public is one of the enforceable rights recognized by the privileges and immunities clause. Unfortunately, the privileges and immunities clause was rendered a "practical nullity" by the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 71, 77-79 (1873). See E. S. Corwin, *The Constitution of the United States of America*, 1076 (1964 ed.). In *Twining v.*

<sup>5</sup> The Court in *Jones* indicated that the old view of the *Civil Rights Cases*, 109 U.S. 1, 24 (1883) that racial discrimination in public accommodations was not a badge of slavery may no longer command a majority. See *Jones*, 392 U.S. at 441 n. 78.



*New Jersey*, 211 U.S. 78, 97 (1908), the Court enumerated the rights which it considered among the "privileges and immunities" of United States Citizenship. Freedom from private discrimination was not among them. Moreover, although the Court has applied the privileges and immunities clause to ensure freedom of interstate travel, *Edwards v. California*, 314 U.S. 160 (1941), and to cut down state welfare residency requirements, *Shapiro v. Thompson*, 37 U.S.L.W. 4333 (April 21, 1969), the Court has never held that the privileges and immunities clause alone proscribes private discrimination in public accommodations. This is not to say that Congress does not have the power to "reach" public accommodations via Section 5 of the 14th Amendment, but that is not at issue here.

For all these reasons, we find that Montgomery County Ordinance 4-120 was enacted by the County Council in violation of its authority under the Charter, and as such is unenforceable as a matter of law.

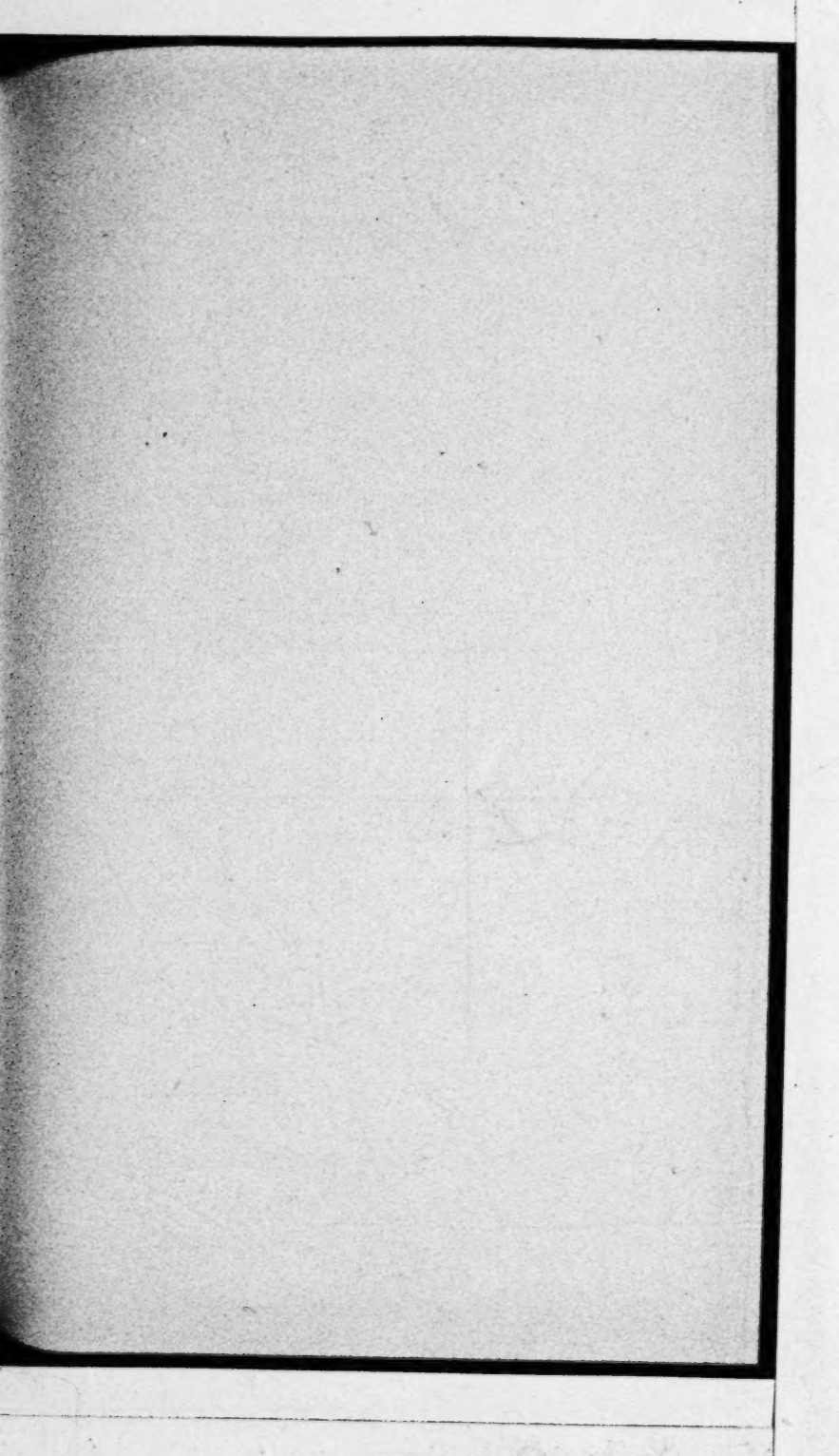
As we said earlier, our disposition of the case makes it unnecessary to reach the other arguments raised by the Defendant in his demurrer, viz., that the Ordinance does not apply to barber shops, that the State has pre-empted the field, and that the Ordinance violates the Defendant's 13th Amendment right to be free of involuntary servitude.

It Is Thereupon, this 12th day of September, 1969, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the Demurrer filed by the Defendant in the above-captioned matter be, and the same is hereby SUSTAINED.

IRVING A. LEVINE,

Judge of the Circuit Court for  
Montgomery County, Maryland.



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

No. 71-1136

MURRAY TILLMAN, ET AL.,  
*Petitioners,*

v.

WHEATON HAVEN RECREATION ASSOCIATION,  
INC., ET AL.,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

BRIEF FOR E. RICHARD MCINTYRE, RESPONDENT

**QUESTIONS PRESENTED**

The courts below have held the Wheaton-Haven Recreation Association, Inc., to be a private club and hence exempt from coverage under the civil rights statutes (42 U.S.C. §§ 1981, 1982 and 2000a) which prohibit racial discrimination. In the petition for a writ of certiorari (at 2), the sole question is whether the holdings in this case are in essential conflict with *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 170 (1969).

This respondent, E. Richard McIntyre, neither supports nor opposes the grant of certiorari on this issue, but submits the following additional questions for the Court's consideration:

1. Whether judgment was properly entered in favor of a director of the Wheaton-Haven Recreation Association, Inc., who was opposed to the policy of racial discrimination attributed to the corporation.
2. Whether an action against a corporation and its directors abates or is rendered moot as to a director removed from office for opposition to the policy of racial discrimination attributed to the corporation.

### STATEMENT OF THE CASE

Petitioners brought this action to compel Wheaton-Haven, a non-profit corporation which operates a member-owned community swimming pool, to extend membership and guest privileges without racial discrimination. Suit was brought as a class action\* seeking declaratory and injunctive relief, as well as damages, against Wheaton-Haven and 13 of its officers and directors.

This respondent, E. Richard McIntyre, was joined to this action solely because he served on the board of directors when Wheaton-Haven adopted the discriminatory policy complained of. No individual act of discrimination was attributed to him personally. The complaint, as twice amended (R. 185), sought to visit collective liability upon the officers and/or directors, based upon the alleged de-

---

\* The asserted right to Petitioners to prosecute their claims as a class action was challenged below. No determination has been made under the provisions of Rule 23(c)(1), Federal Rules of Civil Procedure.

cision of the board of directors to withhold membership and guest privileges from Negro applicants.

In the District Court, McIntyre filed a timely motion to dismiss the action as to him or, in the alternative, for summary judgment (R. 224), urging *inter alia* the failure of the complaint to state a claim against him individually. In support of summary judgment McIntyre relied upon his deposition, on file in these proceedings (R. 184), wherein he denied under oath having supported any racially-motivated policy of exclusion and testified that he favored the admission of petitioners on a non-discriminatory basis. See Appendix hereto, *infra* at pp. 9-10.

Without passing upon this motion, however, the District Court proceeded instead to hold that Wheaton-Haven is "a private club or other establishment not in fact open to the public" under 42 U.S.C. §2000a(e) and thereby exempt from coverage under the Civil Rights Act. No other question was considered or decided as the District Court, in acting upon Wheaton-Haven's motion for summary judgment, granted judgment for all respondents (Pet. App. C). The Fourth Circuit affirmed that judgment and denied rehearing *en banc* (Pet. App. B), but did not pass upon the points briefed and argued by McIntyre except to note that he "championed the cause of the admission of Dr. Press", one of the petitioners (Pet. App. B-30).

Following oral argument but prior to decision of the Fourth Circuit, McIntyre was defeated for reelection to the board of directors.

### ARGUMENT

Because McIntyre did not raise the "private club" issue in the District Court or Court of Appeals, he takes no position on whether the decisions of those courts are consistent with principles enunciated in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Indeed, because he favors admission of petitioners without regard to race, as a matter of social policy, it is doubtful that a justiciable controversy exists between these parties.

In the event that certiorari is granted for reasons stated in the petition, it should be denied as to McIntyre or the judgment summarily affirmed on the basis that no personal acts of racial discrimination have been attributed to him. That the courts below found it unnecessary to reach this issue is immaterial. This Court may consider any position in support of the judgment in his favor, including contentions not passed on by the courts below, which find support in the record. *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931).

It is respectfully submitted that the complaint articulates no basis for relief against McIntyre or any other individual defendant. Although petitioners complain of the collective refusal by the corporation and its officers and/or directors to permit them use of the pool, the short answer is that one never incurs personal liability for corporate acts or policies "unless he specifically directed the particular act to be done, or participated or cooperated therein". 3 FLETCHER CYCLOPEDIA CORPORATIONS, §1137 (1965 ed.). "Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer



or agent of a corporation for the tort of the corporation". *Lobato v. Pay Less Drug Stores*, 261 F. 2d 406, 409 (10th Cir. 1958). Merely identifying one as an "officer and/or director" of the offending corporation is not enough. *McCoy v. Stroud & Co.*, 373 F. 2d 862, 865 (3rd Cir. 1967); *Lahr v. Adell Chemical Co., Inc.*, 300 F. 2d 256, 260 (1st Cir. 1962); *Phelps Dodge Refining Corp. v. F.T.C.*, 139 F. 2d 393, 397 (2d Cir. 1940). And conclusory allegations in the complaint to this effect are equally insufficient to withstand a properly supported motion for summary judgment. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-290 (1968).

What is true with respect to actions at law for damages is equally applicable in suits for injunctive relief:

"\* \* \* [T]he officers, agents and stockholders of a corporation are not necessary parties defendant in either an action at law or a suit in equity against the corporation unless, generally, they have a distinct individual and indivisible interest or a distinct several liability as participants in the wrongdoing or breach of contract complained of; and it is ordinarily improper to join them as such parties defendant merely because of their relation to the corporation. And this rule undoubtedly obtains in the case of a suit for an injunction as well as in the case of any other suit in equity."

FLETCHER CYCLOPEDIA CORPORATIONS §4873 (1970 rev.).

And see *S.E.C. v. Union Corp. of America*, 205 F. Supp. 518, 521-522 (E.D. Mo.), affirmed 309 F. 2d 93 (8th Cir. 1962) (injunction against corporation not extended to officers and directors not shown to have acted in bad faith).

Although the question has never been squarely decided by this Court, there is uniformity of decision in the lower federal courts that corporate conduct which is actionable under civil rights legislation does not of itself impose personal liability upon individuals acting solely in a repre-

representative capacity. Unless the complaint specifically alleges acts of personal wrongdoing, a claim is not stated against members of a board charged with acting improperly as a corporate body. *Derby v. University of Wisconsin*, 325 F. Supp. 163, 164 (E.D. Wis. 1971); *Lessard v. Van Dale*, 318 F. Supp. 74, 75-76 (E.D. Wis. 1970); *Abel v. Gousha*, 313 F. Supp. 1030, 1031 (E.D. Wis. 1970); *Schwartz v. Galveston Independent School District*, 309 F. Supp. 1034, 1037-1038 (S.D. Texas 1970); *Wesley v. City of Savannah*, 294 F. Supp. 698, 703 (S.D. Ga. 1969) (as to three defendants).

Since these precedents require dismissal as to a director joined as a party defendant but not charged with individual misconduct, McIntyre is presently entitled to such relief. Furthermore, he stands united with petitioners in his unflagging opposition to the racial policies challenged in this case, even if his commitment to conscience is not exacted by the law as construed and applied below.

The unpopularity of McIntyre's position sealed his defeat for reelection to the Wheaton-Haven board of directors. While retaining ordinary membership, he no longer occupies any official position in the corporate hierarchy and cannot participate in the board's decisions. Under analogous circumstances, an action to compel an official to perform a public duty is held to abate against the incumbent upon his retirement, although it may survive as to his successor. *Pullman Co. v. Knott*, 243 U.S. 447 (1917); *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897). Identical considerations apply here.

**CONCLUSION**

For the foregoing reasons, the judgment entered in favor of this respondent, E. Richard McIntyre, was correctly entered and should not be disturbed. Accordingly, as to said respondent, the petition for a writ of certiorari should be denied or, if granted, the judgment should be summarily affirmed.

Respectfully submitted,

JOHN H. MUDD,

H. THOMAS HOWELL,

Attorneys for Respondent,  
E. Richard McIntyre.

Of Counsel:

SEMMES, BOWEN & SEMMES.

April 1972.



## APPENDIX

Extract from the deposition of E. Richard McIntyre, March 23, 1970 (R. 168).

\* \* \* \* \*

(38) Q. During your membership on the Board of Directors, have you proposed that the Board or the Association adopt a policy to exclude members or potential members on the basis of race or religion, or national origin, color, or similar circumstances? (39) A. My proposals have always been to the opposite effect.

Q. Have you ever voted in favor of a proposal which would exclude persons on the basis of their race or color? A. No.

Q. Have you, as a member of the Board of Directors, ever proposed a policy limiting guests or members to members of the white or Caucasian race? A. No.

Q. Have you ever proposed or voted in favor of a policy which would exclude Negroes or persons on the basis of race or color? A. No. My votes in that fashion have always been to the other side of the coin.

Q. With respect to the requests, formal or informal by or on behalf of Dr. and Mrs. Press, have you at any time sought unfavorable action with regard to their request for membership? A. Would you repeat that? I am not quite sure I understand.

Q. Let me put it in simple terms. Have you ever proposed or voted that the Association turn down Dr. and Mrs. Press on the basis of their race or color? (40) A. Oh, no, no.

Q. Have you voted to reject them as members for any reasons? A. No.

Q. Have you taken a contrary position with respect to them? A. Yes.

Q. What is that position, sir? A. That they ought to be members of the pool.

Q. Now, with regard to Mrs. Rosner — it is Mrs., is that correct?

(Mr. Brown) Yes.

By Mr. Howell:

Q. Have you ever met Mrs. Rosner? A. No.

Q. Have you ever proposed or voted against her becoming a guest of the Association, or have you acted in any way to deny her the use of the pool as a guest of a bonafide member? A. I don't believe I have.

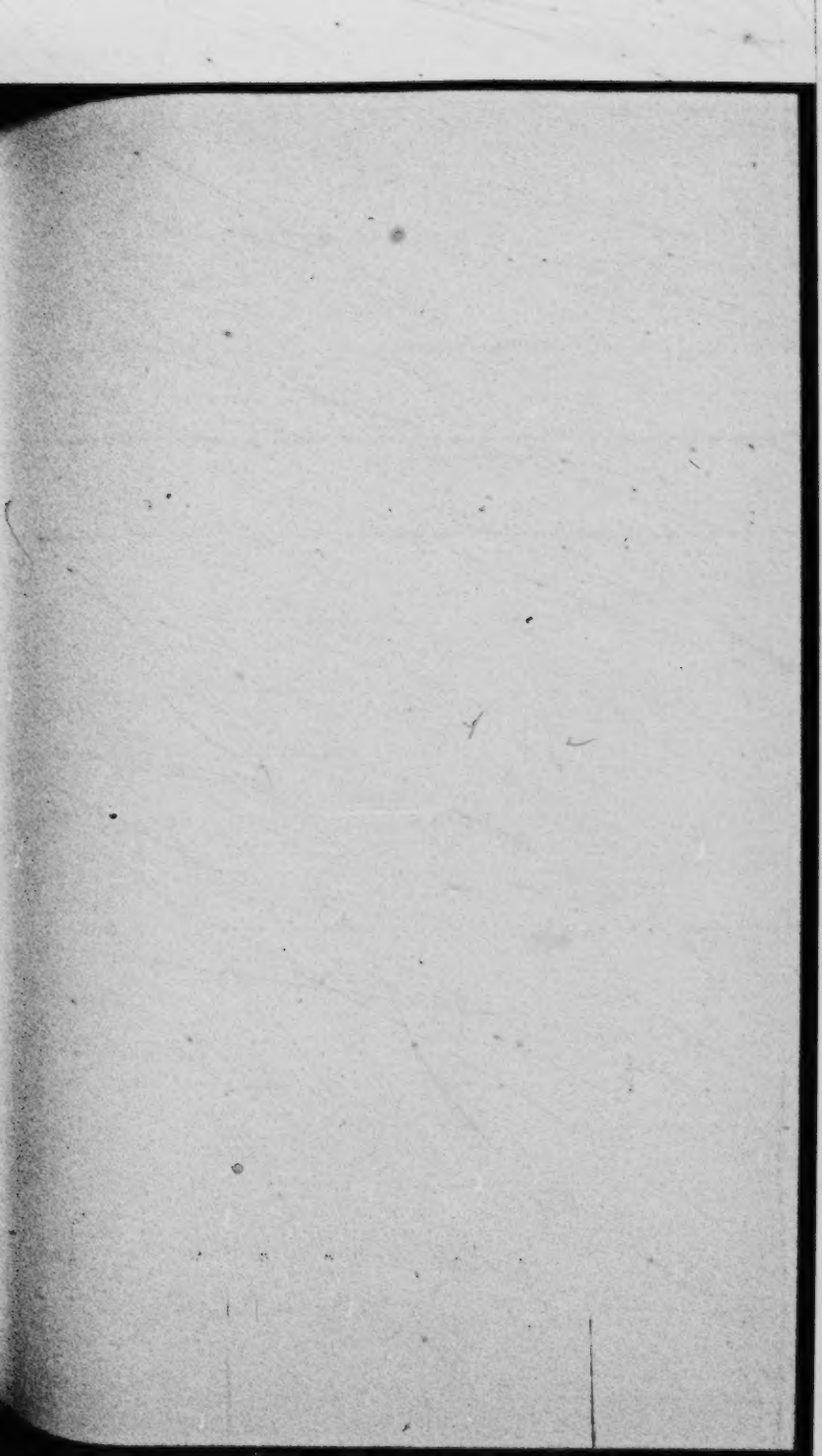
Q. As a member of the Association, have you ever cast a vote one way or the other with respect to the admission or exclusion of guests or members on the basis of their racial— (41) A. Yes.

Q. Did you cast such a vote in the 1968 meeting in November 1968? A. I think I did.

Q. Can you recall the general nature of the vote and what your vote was? A. At that point and time the vote was as to whether or not the policy to admit guests only relatives of members, was taken, and I voted against that policy. This was at a general membership meeting in which I voted as a member, and I think I spoke as a member, although I was seated in an area where the Board of Directors were.

• • • • •





**In the Supreme Court of the United States**

**OCTOBER TERM, 1971**

**No. 71-1136**

**MURRAY TILLMAN, ET AL., PETITIONERS**

**v.**

**WHEATON-HAVEN RECREATION ASSOCIATION, INC., ET AL.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES  
AS AMICUS CURIAE**

The United States submits this memorandum in support of the petition for a writ of certiorari.

**INTEREST OF THE UNITED STATES**

The United States has a continuing interest in, and responsibility for, eradicating discriminatory practices which deny to the members of any group, on account of their race, access to residential communities, to places of public accommodation or to community recreational facilities. This is especially so with respect to practices which deny to individuals, on the basis of race, the same benefits that are ac-

corded to their neighbors in the community in which they reside, thereby encouraging segregated housing arrangements. See Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982; Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a; and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* Our participation here is in accordance with the government's participation in such cases as *Palmer v. Thompson*, 403 U.S. 217; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; *Daniel v. Paul*, 395 U.S. 298; *Hunter v. Erickson*, 393 U.S. 385; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Boydton v. Virginia*, 364 U.S. 454; and *Shelley v. Kraemer*, 334 U.S. 1.

#### REASONS FOR GRANTING THE WRIT

By a divided vote, the court below (Pet. App. B-1 to B-23) has sanctioned the exclusion, solely on account of race, from membership in and use of a neighborhood swimming facility—"open to bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool" (Pet. 3)—of black residents of the community served, and of black guests of white residents who have obtained membership. The decision is premised on a finding that the Wheaton-Haven Recreation Association is a "private club" within the meaning of the public accommodations provisions of Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)), and thus is exempt from that Act's requirement of non-discrimination, and on a holding that the 1964 public accommodations provisions were intended to limit whatever relief

might otherwise have been available to petitioners under the Civil Rights Act of 1866 (42 U.S.C. 1982).

In both respects, we think the court of appeals erred. Its decision is in direct conflict with this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, and is contrary to the Fifth Circuit's recent holding in *Sanders v. Dobbs Houses, Inc.*, 431 F. 2d 1097, 1100 (C.A. 5). It raises important questions concerning the proper construction and application of the above statutory provisions which this Court should resolve.

1. In *Sullivan v. Little Hunting Park, Inc.*, *supra* this Court held that a recreational facility similar to the one involved here, which is open to all residents in a given geographical area, was not a private social club. There, every adult owning or leasing a house in the prescribed area was eligible for membership, subject only to the approval of the board of directors. "There was no plan or purpose of exclusiveness" (396 U.S. at 236). The Court ruled that in those circumstances the denial of membership to a black tenant, solely on the ground of race, "was clearly an interference with [his] right to 'lease'" (396 U.S. at 237), and hence violated the mandate of 42 U.S.C. 1982 that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The court below purports to distinguish *Sullivan* essentially on the ground that membership in the

4

Wheaton-Haven facility is not tied to the purchase or lease of a home in the geographic area—i.e., is not “unequivocally tied to the land” (Pet. App. B-15)—but is open to “persons who actually reside within an area described by a circle three-quarters of a mile in radius with its center at the pool” (Pet. App. B-16). Even though membership is thus an incident of “residence”, the majority below reasoned that it could not be deemed “incidental to, or part of, the rights acquired directly with the acquisition of possessory rights” (Pet. App. B-16) within the designated three-quarter-mile radius. Rather, it viewed the Wheaton-Haven facility as affording “an area preference, and nothing more” (*ibid.*), pointing to the fact that, subject to a limit of thirty percent of total membership, persons who reside outside the prescribed area can obtain membership on recommendation of a member.

In our view, the court’s distinction unjustifiably exalts form over substance, and seriously undermines the essential thrust of this Court’s decision in *Sullivan*. As the dissent below properly points out, petitioners “Dr. and Mrs. Press have their claim on ownership of real property situated less than three-quarters of a mile from the pool” (Pet. App. B-26). As an incident of that ownership—being residents of the community—they are entitled to membership in the pool no less than the tenant in *Sullivan* who based his claim on his right to lease. In the words of the dissent below (Pet. App. B-26): “Section 1982 protects the rights to ‘purchase’ and ‘hold’ property no less than the right to ‘lease’.” Its fundamental pur-



case should not be defeated by giving it the narrow construction adopted by the majority below. See *Sullivan v. Little Hunting Park, supra*, 396 U.S. at 287.

Nor should it make a difference that, to a limited extent, membership is also available to persons residing outside the geographic area. Petitioners correctly point out (Pet. 12) that the same situation existed in *Sullivan* with respect to the authorized membership of Little Hunting Park. In neither instance does that circumstance justify characterization of the facility as a private club. Membership which, as here, may be transferred by the homeowner through use of a first option at the time he sells his home,<sup>1</sup> and which is based essentially on geography, is the very antithesis of the private social club. See *Nesmith v. YMCA of Raleigh, N.C.*, 397 F. 2d 96, 102 (C.A. 4); and see *United States v. Richberg*, 398 F. 2d 523 (C.A. 5); *Rockefeller Center Luncheon Club, Inc. v. Johnson*, 131 F. Supp. 703 (S.D.N.Y.). There has been no attempt here to achieve any sort of compatibility of background or

<sup>1</sup>Under the Wheaton-Haven by-laws (Pet. 4): "If a member who is also a homeowner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors." While this is different in form from the Little Hunting Park's transfer of membership by assignment, there is no substantive difference. Nor do we agree with the court below that, because membership rolls are not fully filled, the option is essentially valueless (Pet. App. B-11 to B-13). At the time petitioners might decide to sell, the membership rolls could well be full, thus making the membership option significantly more valuable to the purchaser than it might be if the sale were to occur at the present time.



interest, save geography. See *Daniel v. Paul*, 395 U.S. 298, 301-302.

2. In concluding that the Wheaton-Haven facility is covered by the "private club" exemption in the 1964 Act, the majority below stated that "[t]his exception to the ban on racial discrimination of necessity operates as an exception to the Act of 1866, in any case where that Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act" (Pet. App. B-6). This flies squarely in the face of this Court's statement in *Sullivan v. Little Hunting Park, Inc.*, *supra*, 396 U.S. at 237:

We noted in *Jones v. Mayer Co.*, that the Fair Housing Title of the Civil Rights Act of 1968, 82 Stat. 81, in no way impaired the sanction of § 1982. 392 U.S. at 413-417. What we said there is adequate to dispose of the suggestion that the public accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. . . .

Accord: *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416-417 n. 20; *Sanders v. Dobbs Houses, Inc.*, 431 F. 2d 1097, 1100-1101 (C.A. 5).\*

3. Accordingly, the decision below merits review by this Court. If Wheaton-Haven can properly exclude Negroes systematically from its membership, the protections afforded by 42 U.S.C. 1982, as interpreted by this Court in *Sullivan*, will be significantly diluted. Under the guise of affording "residence" in a per-

\* In *Sanders*, the Fifth Circuit held that the specific remedies in Title VII of the Civil Rights Act of 1964 do not preempt the general remedial language of 42 U.S.C. 1981.

icular geographic area "an area preference, and nothing more" (Pet. App. B-16), a Negro can be given the same rights of ownership of real property as a white citizen, but can be precluded from enjoying some of the incidents thereof on the basis of his race.

The statutory pledge to the Negro in Section 1982 that he shall enjoy "the same right \* \* \* as \* \* \* white citizens" is not so empty (see *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 443) that it can be satisfied if Negroes are allowed to buy or rent homes, but are, in significant part, barred from the neighborhood by being denied access to a community recreational facility which is, for white persons, a valuable incident of the possession of real property there.

#### CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

DAVID L. NORMAN,  
*Assistant Attorney General.*

LAWRENCE G. WALLACE,  
*Deputy Solicitor General.*

WM. BRADFORD REYNOLDS,  
*Assistant to the Solicitor General.*

JOHN C. HOYLE,  
*Attorney.*

APRIL 1972.

## INDEX

	<u>Page</u>
OPINIONS BELOW . . . . .	1
JURISDICTION . . . . .	2
QUESTION PRESENTED . . . . .	2
STATUTES INVOLVED . . . . .	2
STATEMENT . . . . .	4
A. Wheaton-Haven Recreation Association, Inc.—its purpose and manner of operation . . . . .	4
B. Wheaton-Haven's racially discriminatory membership and guest policies . . . . .	6
C. Proceedings below . . . . .	7
SUMMARY OF ARGUMENT . . . . .	8
ARGUMENT . . . . .	10
1. Wheaton-Haven's racially discriminatory policies violate the Civil Rights Act of 1866 (42 U.S.C. §§1981, 1982) . . . . .	10
A. The remedy provided by the Act of 1866 for racially discriminatory conduct should be broadly construed . . . .	10
B. Rights secured to petitioners by the Act of 1866 are violated by Wheaton- Haven's racially discriminatory member- ship and guest policies . . . . .	17

	<u>Page</u>
C. Wheaton-Haven lacks the characteristic of exclusiveness associated with a truly private club, since membership is open to all residents of the area prescribed by its by-laws . . . . .	20
D. There are no valid grounds for distinguishing this case from <i>Sullivan v. Little Hunting Park</i> . . . . .	24
II. Wheaton-Haven's racially discriminatory policies violate the Civil Rights Act of 1964 (42 U.S.C. §2000a) . . . . .	27
CONCLUSION . . . . .	29

### CITATIONS

#### Cases:

<i>American Universal Insurance Co. v. Scherfe Insurance Agency,</i> 135 F. Supp. 407 (S.D. Iowa, 1954) . . . . .	30
<i>Barrows v. Jackson,</i> 346 U.S. 249 (1953) . . . . .	23
<i>Boudreaux v. Baton Rouge Marine Contracting Co.,</i> 437 F.2d 1011 (C.A. 5, 1971) . . . . .	16
<i>Brady v. Bristol-Meyers, Inc.,</i> decided May 8, 1972, 4 FEP Cases 749 (C.A. 8) . . . . .	16
<i>Brown v. Ballas,</i> 331 F. Supp. 1033 (N.D. Tex., 1971) . . . . .	16, 30
<i>Brown v. Gaston County Dyeing Machine Co.,</i> 457 F.2d 1377 (C.A. 4, 1972) . . . . .	16

	<u>Page</u>
<i>Civil Rights Cases,</i>	
109 U.S. 3 (1883) . . . . .	12
<i>Collyer v. Yonkers Yacht Club,</i>	
17 A.D.2d 973,	
234 N.Y.S.2d 259 (1962) . . . . .	19
<i>Daniel v. Paul,</i>	
395 U.S. 298 (1969) . . . . .	21, 27, 28
<i>Grier v. Specialized Skills, Inc.,</i>	
326 F. Supp. 856 (W.D., N.C., 1971) . . . . .	16
<i>Hitchcock v. American Plate Glass Co.,</i>	
259 Fed. 948 (C.A. 3, 1919) . . . . .	30
<i>Hyde v. Woods,</i>	
4 Otto 523 (1877) . . . . .	18
<i>International Brotherhood of Electrical Workers</i>	
<i>v. National Labor Relations Board,</i>	
341 U.S. 694 (1951) . . . . .	28
<i>Jones v. Mayer Co.,</i>	
392 U.S. 409 (1969) . . . . .	11, 12, 13, 14, 15
<i>Knight v. Auciello,</i>	
453 F.2d 852 (C.A. 1, 1972) . . . . .	16, 29
<i>Lee v. Southern Home Sites Corp.,</i>	
429 F.2d 290 (C.A. 5, 1970),	
444 F.2d 143 (C.A., 1971) . . . . .	16, 29
<i>Lobato v. Pay Less Drug Stores, Inc.,</i>	
261 F.2d 406 (C.A. 10, 1958) . . . . .	30
<i>McLaurin v. Brusturis,</i>	
320 F. Supp. 190 (E.D.Wis., 1970) . . . . .	16
<i>Miller v. Amusement Enterprises, Inc.,</i>	
394 F.2d 342 (C.A. 5, 1968) . . . . .	28



	<u>Page</u>
<i>National Cash Register Co. v. Leland</i> , 94 Fed. 502 (C.A. 1, 1899), cert. denied, 175 U.S. 724 . . . . .	30
<i>National Fire Insurance Co. v. Thompson</i> , 281 U.S. 331 (1930) . . . . .	24
<i>National Labor Relations Board v. The Austin Co.</i> , 165 F.2d 592 (C.A. 7, 1947) . . . . .	28
<i>National Labor Relations Board</i> <i>v. Local 1423, United Brotherhood of Carpenters</i> , 238 F.2d 832 (C.A. 5, 1956) . . . . .	28
<i>National Labor Relations Board v.</i> <i>National Survey Service</i> , 361 F.2d 199 (C.A. 7, 1966) . . . . .	28
<i>Nesmith v. Y.M.C.A. of Raleigh, N.C.</i> , 397 F.2d 96 (C.A. 4, 1968) . . . . .	21, 29
<i>Page v. Edmunds</i> , 187 U.S. 596 (1903) . . . . .	18
<i>Rockefeller Center Luncheon Club, Inc. v. Johnson</i> , 131 F. Supp. 703 (S.D.N.Y., 1955) . . . . .	21
<i>Sanders v. Dobbs Houses, Inc.</i> , 431 F.2d 1097 (C.A. 5, 1970) . . . . .	16
<i>Scott v. Young</i> , 421 F.2d 143 (C.A. 4, 1970), cert. denied, 398 U.S. 929 . . . . .	16, 28
<i>Shelley v. Kraemer</i> , 334 U.S. 1 (1948) . . . . .	23
<i>Smith v. Sol D. Adler Realty Co.</i> , 436 F.2d 344 (C.A. 7, 1971) . . . . .	16, 29



	<u>Page</u>
<i>Sullivan v. Little Hunting Park</i> , 396 U.S. 229 (1969) . . . . .	2, 8, 10, 13, 14, 15, 17, 19, 20, 23, 24, 25, 26, 27, 28, 29
<i>Terry v. Elmwood Cemetery</i> , 307 F. Supp. 369 (N.D.Ala., 1969) . . . . .	16
<i>Trounstein v. Bauer, Pogue &amp; Co.</i> , 144 F.2d 379 (C.A. 2, 1944), cert. denied, 323 U.S. 777 . . . . .	30
<i>United States v. Central Carolina Bank &amp; Trust Co.</i> , 431 F.2d 972 (C.A. 4, 1970) . . . . .	28
<i>United States v. Pink</i> , 315 U.S. 203 (1942) . . . . .	24
<i>United States v. Richberg</i> , 398 F.2d 523 (C.A. 5, 1968) . . . . .	21
<i>Walker v. Pointer</i> , 304 F. Supp. 56 (N.D.Tex., 1969) . . . . .	19
<i>Waters v. Wisconsin Steel Works</i> , 427 F.2d 476 (C.A. 7, 1970), cert. denied, 400 U.S. 911 . . . . .	16
<i>Williamson v. Hampton Management Co.</i> , 339 F. Supp. 1146 (N.D., Ill., 1972) . . . . .	30
<i>Young v. International Telephone &amp; Telegraph Co.</i> , 438 F.2d 757 (C.A. 3, 1971) . . . . .	16
 <b>Constitutional and Statutory Provisions:</b>	
Thirteenth Amendment to the Constitution . . . . .	12, 14
28 U.S.C. §1254(1) . . . . .	1

	<u>Page</u>
42 U.S.C. §1981 . . . . .	2, 7, 8, 10, 11, 12, 13, 15, 16, 17, 19, 20, 27, 28, 29
42 U.S.C. §1982 . . . . .	2, 3, 7, 8, 10, 11, 12; 14, 16, 17, 18, 19, 27, 28, 29
42 U.S.C. §2000a . . . . .	2, 3, 7, 10, 15, 27, 28
42 U.S.C. §2000e . . . . .	16
42 U.S.C. §3601 . . . . .	14
Internal Revenue Code, 26 U.S.C. §501(c)(7) . . . . .	6
Maryland Code Annotated Art. 81, §288(d)(8) . . . . .	6

#### Miscellaneous:

Larson, The Development of §1981 as a Remedy for Racial Discrimination in Private Employment, 7 Harv. Civ. Rights L. Rev. 56 (1972) . . . . .	16
17 Am. Jur. 2d, Contracts §302-319 . . . . .	20
Restatement (Second) of Torts §330, 332 (1965) . . . . .	19
(Washington) Evening Star, April 25, 1969 . . . . .	17
Washington Post, January 12, 1967 . . . . .	17

IN THE  
**Supreme Court of the United States**

October Term, 1971

---

No. 71-1136

---

MURRAY TILLMAN, *et al.*,

*Petitioners,*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., *et al.*,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

BRIEF FOR THE PETITIONERS<sup>1</sup>

---

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B1-B31)<sup>2</sup> is reported at 451 F.2d 1211. The District Court's opinion (Pet. App. C1-C13) is unreported.

---

<sup>1</sup> Petitioners, in addition to Murray Tillman, are Rosalind N. Tillman, his wife, Dr. Harry C. Press and Francella Press, his wife, and Mrs. Grace Rosner. Respondents, in addition to Wheaton-Haven Recreation, Inc., are Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, Richard E. McIntyre, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr. and James M. Whittles, individuals who were officers and/or directors of said corporation at times material herein (A. 8, 23).

<sup>2</sup> "Pet. App." refers to the appendix to the petition for a writ of certiorari. "A." refers to the separate appendix to the briefs.

## JURISDICTION

The judgment of the court of appeals was entered on October 27, 1971. A petition for rehearing and suggestion for rehearing *en banc* was duly filed and the court of appeals entered its order of denial on December 16, 1971 (A. 40). The petition for a writ of certiorari was filed on March 13, 1972, and was granted on May 15, 1972. The jurisdiction of this court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court of appeals erred in holding a community recreation association to be a private club and hence exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C. §§1981, 1982 and 42 U.S.C. §2000a), despite the fact that this Court in a previous case (*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969)) held that an association with virtually identical characteristics could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.

## STATUTES INVOLVED

The relevant provisions of the Civil Rights Act of 1866, as incorporated in 42 U.S.C. §§1981, 1982, are as follows:

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts \* \* \* as is enjoyed by white citizens \* \* \* .

§1982. All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The relevant provisions of Title II of the Civil Rights Act of 1946 (42 U.S.C. §2000a) are as follows:

§201(a) (42 U.S.C. Sec. 2000a(a)). All persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

§201(b) (42 U.S.C. §2000a(b)). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce \* \* \* :

\* \* \*

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; \* \* \*

\* \* \*

§201(c) (42 U.S.C. §2000a(c)). The operations of an establishment affect commerce within the meaning of this title if \* \* \* (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films,

performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; \* \* \*

\* \* \*

§201(e) (42 U.S.C. §2000a(e)). The provisions of this title shall not apply to a private club or other establishment not in fact open to the public \* \* \*

\* \* \*

### STATEMENT<sup>3</sup>

#### A. WHEATON-HAVEN RECREATION ASSOCIATION, INC.— ITS PURPOSE AND MANNER OF OPERATION

Wheaton-Haven Recreation Association, Inc. is a non-profit Maryland corporation organized in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Maryland (Pet. App. C1; A. 7-8, 23). The pool was financed by subscriptions for membership collected from persons residing in the area. The pool presently charges a \$375 initiation fee and an annual dues of \$150-\$160 (Pet. App. C1-C2; A. 44). The by-laws of the association provide that membership "shall be open to bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool" (Art. III, §1, Pet. App. C2; A. 43). Members may be taken from

---

<sup>3</sup> The facts stated herein are based on the district court's findings as modified by the court of appeals.



outside the three-quarter mile radius upon the recommendation of a member as long as members from outside the area do not exceed 30 percent of the total membership (Pet. App. C2; A. 43).<sup>4</sup> In either event, the by-laws provide that applicants for membership must be approved by "an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose" (Art. III, §3, Pet. App. C2; A. 43).

Membership, which is by family units rather than by individuals, is limited to 325 families (Art. III, §§6, 7, Pet. App. C2; A. 43-44). If a member who is also a homeowner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors (Art. VI, Pet. App. C2; A. 47).

Only members and their guests are admitted to the pool. Members of the general public cannot gain admittance by payment of an entrance fee (Pet. App. C2-C3; A. 42-43).

The Wheaton-Haven pool was constructed in 1958-1959 by a contractor from outside the State of Maryland (Pet. App. C3; A. 9, 23, 87, 92). The pool's operation involves the use of pumps, a motor and a chlorine feeder, all manufactured outside of Maryland. There are also snack vending machines. All of these facilities are in an enclosed area accessible only to members and their guests (Pet. App. C3; A. 41, 122-123).

---

<sup>4</sup> At times when the membership rolls are full, applicants for membership are limited to the geographic area within a three-quarter mile radius of the pool, and such applications are considered in chronological order of receipt (Art. V, §3, A. 46).

The pool was constructed pursuant to a "special exception" granted by the Montgomery County Board of Appeals under the county's zoning ordinance (Pet. App. C3-C4; A. 8, 23, 96, 98).<sup>5</sup> Prior to granting the exception, the zoning authority required Wheaton-Haven to demonstrate its financial responsibility by submitting evidence that 60 percent of its projected construction costs were obligated or subscribed (A. 96, 99).

Wheaton-Haven pays state and local property taxes, but is exempt from state and federal income taxes under Maryland Code Ann. Art. 81, §288(d)(8), and §501(c)(7) of the Internal Revenue Code (26 U.S.C. §501(c)(7)) exempting non-profit, membership-owned and controlled recreational facilities (Pet. App. C4; A. 97, 99).

#### B. WHEATON-HAVEN'S RACIALLY DISCRIMINATORY MEMBERSHIP AND GUEST POLICIES

Dr. and Mrs. Harry C. Press, two of the Negro plaintiffs, own a home within the three-quarter mile radius of the pool (Pet. App. C3; A. 11-12). The previous owner of the home was not a member of Wheaton-Haven. In the spring of 1968, Dr. Press sought to obtain a membership application from members of the association's Board of Directors, who declined to furnish him with an application

---

<sup>5</sup> The provisions of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955. In the ordinance, the Council stated, "... this action sets up the community swimming pools as a special exception ... Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefited by such development" (A. 9, 62, 96, 98).

(Pet. App. C3; A. 11, 97, 99). The stipulated reason for their refusal was his race (Pet. App. C3; A. 90, 95).

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. On July 19, 1968, the Tillmans brought Mrs. Grace Rosner, a Negro, to the pool as their guest. She was admitted (Pet. App. C3; A. 12). The following day, at a special meeting, the Board of Directors promulgated a rule limiting guests to relatives of members (Pet. App. C3; A. 12, 97, 99). Mrs. Rosner has been refused admission as a guest of the Tillmans since then (Pet. App. C3; A. 12, 90, 95). The new guest policy was adopted in response to the Tillman's bringing a Negro guest to the pool, though it was intended also to reduce the burgeoning number of guests using the pool (Pet. App. C3; A. 12, 90, 95, 115-117).<sup>6</sup>

At a meeting of the association's members in the fall of 1968, a resolution was adopted reaffirming Wheaton-Haven's policy of not admitting Negroes to its facilities (Pet. App. B30; A. 109, 90, 95).

### C. PROCEEDINGS BELOW

Petitioners brought their complaint in the United States District Court for the District of Maryland, seeking declaratory and injunctive relief, as well as damages. They claimed that Wheaton-Haven's racially discriminatory policies violated their rights under the Civil Rights Act of 1866, 42 U.S.C. § 1981, 1982 and under the Civil Rights Act of 1964 (42 U.S.C. 2000a).

The district court (Northrop, J.) denied the relief sought by plaintiffs, and granted summary judgment to defendants below (Pet. App. C1-C13). Before the court of appeals,

plaintiffs' motion for summary reversal was denied, and following consideration of the merits, a majority of the panel (Haynsworth, Chief Judge, and Boreman, Circuit Judge) affirmed the district court, holding that Wheaton-Haven is a "private club" and hence exempt from the Civil Rights Act of 1866 as well as the Civil Rights Act of 1964 (Pet. App. B1-B23). Judge Butzner, dissenting, would have granted plaintiff's motion for summary reversal of the district court. He found the case to be "indistinguishable in all material aspects" from *Sullivan v. Little Hunting Park*, *supra*, and hence termed the majority decision "a marked departure from authoritative precedent" (Pet. App. B23). Judges Winter and Craven dissented from the court's denial of rehearing *en banc*, and expressed their agreement with Judge Butzner's view that the case is indistinguishable from *Sullivan* (Pet. App. B31). Finally, all three dissenting judges deplored the majority's holding that the 1866 Act was impliedly repealed in part by the 1964 Act.

### SUMMARY OF ARGUMENT

This case involves the question whether a community recreation association established to operate a swimming pool for the benefit of all residents of a neighborhood may exclude persons otherwise eligible on the basis of race. In *Sullivan v. Little Hunting Park*, *supra*, 396 U.S. 229, the Court held that such an association, which has no other criteria for membership than residence within a prescribed area, is not a "private club" because it lacks a "plan or purpose of exclusiveness," and therefore is subject to applicable laws prohibiting racial discrimination.

Wheaton-Haven Recreation Association, Inc., whose racially discriminatory membership and guest policies are at

issue here, is typical of many such non-profit associations organized in suburban neighborhoods by residents who contribute their time and energy to establish neighborhood recreational facilities for themselves and their families. Wheaton-Haven's by-laws specify that membership in the association is open to everyone residing within a three-quarter mile radius of its swimming pool. Community recreation facilities, particularly a swimming pool, obviously are a major factor affecting the desirability and attractiveness of residential property. The availability of such facilities for all white residents of a neighborhood and the routine exclusion of Negroes, will both discourage the latter from buying in that community and make any purchase they do make a poorer bargain than a white citizen could obtain. To thus allow an association such as Wheaton-Haven to exclude Negroes from community recreation facilities places in the hands of this private group the power to control the racial composition of a neighborhood, a result comparable to enforcement of a racially restrictive covenant.

The close relationship between membership in Wheaton-Haven and the ownership of property in the neighborhood served by the pool is shown by the provision of the association's by-laws giving a member who sells his home the right to make his membership available for purchase by the buyer of his home, despite the fact that there may be a waiting list of persons who have been seeking memberships for a substantial period of time. This nexus between membership in the pool and the passage of title to real property in the neighborhood which it serves, and the fact that the home buyer in such circumstances has priority in obtaining a membership over those on the waiting list, evidences the fact that the organizers of Wheaton-Haven were well aware that the availability of a pool membership

would add to the attractiveness and value of their homes. This provision of Wheaton-Haven's by-laws refutes any claim of exclusiveness the association might make, since one's eligibility for membership in such circumstances is entirely a function of who he buys his house from.

The Civil Rights Act of 1866 (42 U.S.C. §§1981, 1982) protects Negroes against private acts of discrimination in transactions based on contract, and in matters involving the ownership or possession of real or personal property. Rights of petitioners secured by the Act of 1866 are violated by Wheaton-Haven's racially discriminatory membership and guest policies. Wheaton-Haven's racist policies also violate plaintiffs' rights under the Civil Rights Act of 1964 (42 U.S.C. 2000a).

This case is indistinguishable in all material aspects from *Sullivan v. Little Hunting Park, supra*, and the court below erred in failing to follow that precedent. The court assumed differences between the two cases where in fact none exist, and it relied on an invalid factual analysis of the two cases to support its determination not to be bound by *Sullivan*.

## ARGUMENT

- I. WHEATON-HAVEN'S RACIALLY DISCRIMINATORY POLICIES VIOLATE THE CIVIL RIGHTS ACT OF 1866 (42 U.S.C. §§1981, 1982)
  - A. The remedy provided by the Act of 1866 for racially discriminatory conduct should be broadly construed

Section 1 of the Act of April 9, 1866, 14 Stat. 27, entitled "An Act to protect all Persons in the United States



in their Civil Rights, and furnish the means of their Vindication," provides as follows:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding.

In codifying this section, it was divided into two parts, 42 U.S.C. §§1981 and 1982, but the language remained essentially unchanged with §1981 securing the right to "make and enforce contracts" and §1982 securing the right to "inherit, purchase, lease, sell, hold, and convey real and personal property."

In *Jones v. Mayer Co.*, 392 U.S. 409 (1968), the Court exhaustively reviewed the legislative history of Section 1 of the Act of 1866. The congressional debates and historical circumstances attending passage of the law were

examined in detail, leading the Court to conclude that, "In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein \* \* \*" 392 U.S. at 436.

The Civil Rights Act of 1866 was enacted by Congress pursuant to the Thirteenth Amendment which, as its text<sup>67</sup> reveals, "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Not only did the Thirteenth Amendment, abolish slavery and establish universal freedom, but it did much more. As the Court has stated, its enabling clause "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*'" (emphasis in original). *Jones v. Mayer Co.*, *supra*, 392 U.S. at 439, quoting *Civil Rights Cases*, *supra*, 109 U.S. at 20. Under the Thirteenth Amendment, the Court held, Congress has the power "rationally to determine what are the badges and incidents of slavery and to

---

6-7 The Thirteenth Amendment states:

Section 1. Neither slavery nor involuntary servitude, except punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

translate that determination into effective legislation.”  
*Jones v. Mayer Co.*, *supra*, 392 U.S. at 440.

The Congress that passed the Civil Rights Act of 1866, as the Court has noted, “had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups \* \* \*. The congressional debates are replete with references to private injustices against Negroes — references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities” (footnotes omitted). *Id.* at 427-428. The history of the 1866 Act, therefore, reveals congressional objectives for the legislation that “belie any attempt to read it narrowly.” *Id.*, at 431. Senator Turnbull, the author of the Act, declared that it was intended to affirmatively secure for all men, whatever their race or color, “great fundamental rights,” including “the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.” *Id.*, at 431-432. As to those basic civil rights,” the Court has noted, the Act was intended to “break down *all* discrimination between black men and white men” (emphasis in original). *Id.*, at 432.

In *Jones v. Mayer Co.*, the Court held that the Act of 1866 must be accorded “a sweep as broad as its language.” *Id.*, at 437. Summarizing the broad import of the statute in language reiterated in *Sullivan v. Little Hunting Park*, *supra*, 396 U.S. at 235-236, the Court stated (392 U.S. at 443):

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom — freedom to “go and come at pleasure” and to “buy and sell when they please” — would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the nation cannot keep (footnotes omitted).

The refusal to sell a home to a person because of his race was held in *Jones v. Mayer Co.* to be violative of 42 U.S.C. §1982. In *Sullivan v. Little Hunting Park* the Court held that a membership share in a community recreation association which had been assigned as part of a lease for the use of the tenant fell within the protection of §1982, and hence could not be disapproved by the association's board of directors merely because the tenant was a Negro. Significantly, in both cases the Court, specifically rejected the assertion that, by enacting comprehensive civil rights legislation in recent years, Congress impliedly repealed the Act of 1866. Thus, the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 (42 U.S.C. §§3601, *et seq.*) is quite different in scope of coverage and method of enforcement from the Act of 1866. Further, Congress was aware of the earlier law's provisions at the time it adopted

the 1968 statute. *Jones v. Mayer Co.*, *supra*, 392 U.S. at 413-417. Likewise, in *Sullivan v. Little Hunting Park* the Court held that the Act of 1866 is not superseded by the Public Accommodations provisions of the Civil Rights Act of 1964 (42 U.S.C. 2000a). The two laws are "plainly 'not inconsistent'" and the later law in no way impairs the sanction of the earlier. 396 U.S. at 237-238.<sup>8</sup>

Since the decision in *Jones v. Mayer Co.*, a considerable body of case law has developed giving further importance to the Act of 1866 as a means of securing equality for Negroes. In *Sullivan v. Little Hunting Park*, the Court re-emphasized the "broad and sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866," and admonished against a "narrow construction" of the statutory language. 396 U.S. at 237. Hence, the 1866 Act has been applied by lower courts to prohibit racially discriminatory practices in employment, housing, public accommodations and education.

To date, five circuit courts of appeals have recognized 42 U.S.C. §1981 as a basis for relief from private racial discrimination in employment. In giving effect to the remedy, provided by this section, these courts have uniformly

---

<sup>8</sup> This express holding by the Court in *Sullivan* was disregarded by the court of appeals in the case at bar. Taking a position directly contrary to this Court's ruling, the majority below held that because the 1964 Public Accommodation provisions contain an exemption for private clubs, a like exemption is to be read into the 1866 Act. The majority stated, "This exception to the ban on racial discrimination of necessity operates as an exception to the Act of 1866 in any case where the Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act" (Pet. App. B6). This is one of several examples, as discussed more fully below, of the court of appeals' demonstrated lack of regard for precedent set by this Court.

rejected the contention that the subsequent enactment of Title VII (Fair Employment Title) of the Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*) invalidated the earlier law. *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (C.A. 5, 1970); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1016-1017 (C.A. 5, 1971); *Brady v. Bristol-Meyers, Inc.*, decided May 8, 1972, 4 FEP Cases 749 (C.A. 8); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (C.A. 4, 1972); *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757, 758-763 (C.A. 3, 1971); *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 481-488 (C.A. 7, 1970), cert. denied, 400 U.S. 911. See also Larson, *The Development of §1981 as a Remedy for Racial Discrimination in Private Employment*, 7 Harv. Civ. Rights L. Rev. 56 (1972).

§§1981 and 1982 of the 42 U.S.C. have also been applied by courts to remedy racial discrimination in housing (e.g., *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (C.A. 5, 1970), 444 F.2d 143 (C.A. 5, 1971); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349 (C.A. 7, 1971), *Knight v. Auciello*, 453 F.2d 852 (C.A. 1, 1972); *McLaurin v. Brusturis*, 320 F. Supp. 190 (E.D. Wis., 1970); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex., 1971)); in connection with admission to an outdoor recreational facility (*Scott v. Young*, 421 F.2d 143, 145 (C.A. 4, 1970), cert. denied, 398 U.S. 929); admission to a trade school (*Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C., 1971), and in the purchase of a cemetery plot (*Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala., 1969)).



**B. Rights secured to petitioners by the Act of 1866 are violated by Wheaton-Haven's racially discriminatory membership and guest policies**

Wheaton-Haven Recreation Association, Inc. is all but indistinguishable from Little Hunting Park, Inc., the organization which was at issue in the *Sullivan* case. Each is a voluntary association organized to operate a community recreation facility, primarily a swimming pool, for residents of a prescribed neighborhood.<sup>9</sup> Here, as in the *Sullivan* case, the structure and function of the recreation association compel the conclusion that reliance on racially discriminatory criteria for determining those eligible to use its facilities is violative of the Civil Rights Act of 1866.

As shown *supra*, p. 7, solely because they are Negroes, Dr. and Mrs. Press were denied the right, which is available to others living in the neighborhood, to purchase a Wheaton-Haven membership share and thereby use the association's recreational facilities. Since the purchase of such a share involves making a contract, the denial to the Press' on the basis of race of the right to enter into such a transaction violated their right secured by §1981 not to be discriminated against in such matters. Likewise, because under common law principles a membership share in Wheaton-Haven,

---

<sup>9</sup> Such cooperatively established recreation associations formed to operate neighborhood swimming pools are particularly common in areas where public swimming pools and beaches are not readily accessible. Petitioners' brief to this Court in the *Sullivan* case (p. 24) noted that in the Northern Virginia suburbs of Washington, D.C., where Little Hunting Park is located there are about 50 community pool associations; there are about 42 such associations in Montgomery County, Maryland, where Wheaton-Haven is located. *The Washington Post*, p. A-20, June 12, 1967; *The (Washington) Evening Star*, p. B-1, Noon edition, April 25, 1969.

a non-stock corporation, constitutes personal property,<sup>10</sup> the discriminatory refusal to permit Dr. and Mrs. Press to purchase such property on the same basis as white persons constituted a violation of §1982. Real property interests subject to the protection of §1982 are also adversely affected by Wheaton-Haven's refusal to allow Dr. and Mrs. Press access to its facilities. Thus, occupancy of their home is rendered less valuable and enjoyable when use of the community swimming pool, which is available to all white residents of the neighborhood, is denied to them because they are black. Further, since under Wheaton-Haven's by-laws the purchaser of a home has the first option to buy the pool membership of his seller, a home obviously may be more valuable on the market if it carries with it an option to purchase such a membership. However, this increment in property value is denied to Negro homeowners such as Dr. and Mrs. Press, since they can have no option to convey. Finally, since membership priority in Wheaton-Haven is given to persons residing within a three-quarter mile radius of the pool, homeowners within that area, of whatever race, who decide to sell to a Negro must be prepared to accept any loss in value to their property resulting from the racial restriction on use of the swimming pool.

Mr. and Mrs. Murray Tillman have a property interest in Wheaton-Haven's pool and recreation facilities as a result of being shareholders, as well as a contractual relationship with the association based on the by-laws and rules and regulations applicable to all members. Under the by-laws and rules, members generally have a right to bring guests

---

<sup>10</sup> *Hyde v. Woods*, 4 Otto 523 (1877); *Page v. Edmunds*, 187 U.S. 596 (1903).

to the pool. The association, by adopting the rule limiting guest privileges to relatives of members, at least partially, in order to impose a racial limitation on the right to bring guests and thereby prohibit Mr. and Mrs. Tillman from taking Mrs. Grace Rosner, a Negro, or for that matter any Negro, to the pool, has created an unlawful racial restriction on the Tillman's property interests, as well as on their contractual relationship with the association. This racial restriction is plainly impermissible in the face of §§1981 and 1982. Since, as shown above, the racial restriction also limits the market for the sale of the Tillman's home and thereby diminishes its value, the restriction is further violative of §1982. Although the Tillmans are white, since they stand in the role of persons seeking "to vindicate the rights of minorities" protected by the statute, they have standing to maintain this action. *Sullivan v. Little Hunting Park, supra*, 396 U.S. at 237; *Walker v. Pointer*, 304 F. Supp. 56, 58-61 (N.D. Tex., 1969).

Mrs. Grace Rosner, as the Negro guest of the Tillmans, similarly has rights under §§1981 and 1982, which were violated by respondents. As the Court held in *Walker v. Pointer, supra*, 304 F. Supp. at 60-62, a guest has an implied easement of ingress and egress, or a license, which constitutes property. Hence, to apply the association's racially restrictive guest policy is to deny prospective Negro guests the right to acquire and enjoy such an easement, as well as the opportunity to receive from members a license or other possessory interest concerning permissible actions while on association property. See *Collyer v. Yonkers Yacht Club*, 17 A.D. 2d 973, 234 N.Y.S. 2d 259 (1962). (social guest of members of club is business invitee); *Restatement (Second) of Torts*, §§330, 332 (1965). It should be further noted that Mrs. Rosner stood in the role of a

third person beneficiary to the contract between the Tillmans and Wheaton-Haven, which incorporated a general policy of permitting members to take guests to the pool. See generally 17 Am. Jur. 2d Contracts, §§302-319. As a third person beneficiary, Mrs. Rosner had the right under §1981 not to be denied performance of the contract because of the imposition of a racial condition.

- C. Wheaton-Haven lacks the characteristic of exclusiveness associated with a truly private club, since membership is open to all residents of the area prescribed by its by-laws.

By sanctioning the exclusion of Negroes from the community recreation facilities operated by Wheaton-Haven, the court of appeals has squarely contravened this Court's decision in *Sullivan v. Little Hunting Park*. Both this case and *Sullivan* involve voluntary associations organized by residents of neighborhood to provide opportunities for recreation for themselves and others in the area, principally by the construction and operation of a swimming pool. In each instance membership in the association, and hence, use of its facilities, is available to everyone residing in the area defined by its by-laws. In neither case did the association pursue a policy of exclusiveness until a black resident of the neighborhood sought the privileges of membership for himself and his family. In *Sullivan*, as here, the court below held that the association could properly exclude the black applicant on the ground that the association was a "private club." In *Sullivan*, however, this Court declared that it found "nothing of the kind on this record." 396 U.S. at 236. The Court continued (*ibid.*):

There was no plan or purpose of exclusiveness. It is open to every white person within

the geographic area, there being no selective element other than race.

Wheaton-Haven similarly has "no plan or purpose of exclusiveness." Its by-laws specify that membership "shall be open to bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool." Unlike the conventional social club, fraternal lodge, or similar organization, personal compatibility with other members is not a qualification for membership in Wheaton-Haven. In conventional social or fraternal organizations — those having as their principal purpose the fostering of fellowship and camaraderie — friendship, tradition and common social, educational or occupational backgrounds play a major role in determining membership eligibility. For Wheaton-Haven, however, the sole determinant of membership is residence within the prescribed area. No further qualification, recommendation, or nomination is required. It is inconsistent with the nature of a truly private club for an organization, in determining membership eligibility, to rely solely on geography, to the exclusion of all other factors — except race. *Nesmith v. Y.M.C.A. of Raleigh, N.C.*, 397 F.2d 96, 102 (C.A. 4, 1968); and see *United States v. Richberg*, 398 F.2d 523 (C.A. 5, 1968); *Rockefeller Center Luncheon Club, Inc. v. Johnson*, 131 F. Supp. 703, 705 (S.D. N.Y., 1955). Wheaton-Haven is functionally similar to the recreational facility in *Daniel v. Paul*, 395 U.S. 298 (1969). The Court there held that an establishment which is "open in general" to "all members of the white race" may not masquerade as a private club merely in order to exclude Negroes from its facilities. 395 U.S. at 302.

Nor is the missing element of selectivity supplied by the fact that under Wheaton-Haven's by-laws, in addition to



the residence requirement, membership applications are subject to approval by a majority vote at a meeting of the membership or of the Board of Directors. There is no evidence that any factor other than area of residence or race has ever been considered as a basis for such votes. Indeed, it is clear that membership approvals are given as a routine matter, as shown by the fact that in Wheaton-Haven's 11-year history prior to the events herein, only one person had ever been rejected for membership. The record does not disclose either the race of that applicant or place of residence at the time of the rejection (Pet. App. B21; A. 88, 93).<sup>11</sup>

Any claim of exclusivity by Wheaton-Haven has a particularly hollow ring, in view of its by-laws provision which gives a member who sells his home the right to make his membership share available for purchase by his vendee, notwithstanding the fact that there may be a waiting list consisting of persons who have been seeking memberships for a substantial period of time.<sup>12</sup> The accident of who one buys his home from, therefore, determines membership eligibility in those circumstances. This by-laws provision

---

<sup>11</sup> The court of appeals erroneously relied on the unsubstantiated claim of defendants' counsel at oral argument that "numerous" other unidentified white persons were informally rejected for membership by being denied an application form (Pet. App. B21, n. 23). This claim is contradicted by defendants' sworn answer to plaintiffs' interrogatory No. 17, which reflects only one rejection for membership, formal or informal, and gives no indication that there were others whose identity was unknown (A. 88, 93).

<sup>12</sup> Thus, Article VI of the by-laws provides that when the membership rolls are full, the association is required to purchase the share of the vendor who wishes to transfer his share to his vendee. Upon receipt of the vendor's resignation, the association must give the vendee first option to purchase the share (A. 47).



further demonstrates that the organizers of Wheaton-Haven were well aware of the important asset that the swimming pool would be to their neighborhood, and that they would increase the attractiveness and value of their homes by being able to assure a potential purchaser not only of the availability of a pool membership, but that if there was a waiting list, the buyer would have the unqualified right to purchase the seller's pool membership.

In view of the membership priority thus given to persons purchasing homes from Wheaton-Haven members, and the priority given generally to persons residing within a three-quarter mile radius of the pool, it is apparent that use of Wheaton-Haven's facilities is in fact an incident of "residence" in the neighborhood served by the pool. Hence, the association's racially discriminatory admission policies cannot be disassociated from other factors generally responsible for residential segregation by race which, unfortunately, is still all too prevalent in this country. The enactment of numerous fair housing laws, federal, state and local, in recent years reflects the national commitment to combat this problem. However, it is clear that the routine exclusion of Negroes from neighborhood recreation facilities would both discourage them from buying in that neighborhood, and make any purchase they did make a poorer bargain than that a white citizen can make. "Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians." *Barrows v. Jackson*, 346 U.S. 249, 254 (1953). As the Court stated in *Sullivan v. Little Hunting Park, supra*, 396 U.S. at 236, "What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in *Shelley v. Kraemer*, 334 U.S. 1 [1948] \* \* \*"

D. There are no valid grounds for distinguishing this case from *Sullivan v. Little Hunting Park*

Faced with the compelling precedent of *Sullivan v. Little Hunting Park*, and the unassailable conclusion of Judges Butzner, Winter and Craven, in dissent, that this case is "indistinguishable" from *Sullivan*, the majority of the court below nevertheless assumed differences between the two cases where in fact none exist, and constructed a false factual analysis of the two cases to support its determination not to be bound by *Sullivan*.<sup>13</sup>

1. The court of appeals made the *clearly erroneous* assumption that Little Hunting Park's recreation facilities, which were involved in *Sullivan*, were built by the same real estate developers who built the subdivisions named in that organization's by-laws, and that therefore the right to use those facilities is incidental to the acquisition of a lot in one of those subdivisions (Pet. App. B9, n. 8, B16). This assumption is belied by the record of the *Sullivan* proceeding in this Court, which was before the court of appeals.<sup>14</sup> The court of appeals' attention was called to

---

<sup>13</sup> The court of appeals did not rely on the district court's reasons for determining that Wheaton-Haven is a private club, but instead stated its own grounds to support its conclusion.

<sup>14</sup> The printed appendix to the briefs used in this Court in the *Sullivan* case was submitted to the court of appeals at oral argument by petitioners' counsel, and was relied upon by the court in writing its opinion. In addition, excerpts from the *Sullivan* appendix, have been designated by petitioners for inclusion in the appendix to the briefs in the instant case (A. 64-84). Petitioners respectfully request this Court to take judicial notice of those portions of the *Sullivan* record. *United States v. Pink*, 315 U.S. 203, 216 (1942); *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 336 (1930).

the fact that there was no connection between Little Hunting Park and any commercial builder, and that the association there, like Wheaton-Haven, is a voluntary organization formed by residents of an area who joined together to build and operate a neighborhood recreation facility (A. 65-76, 77-78).

2. The court of appeals made the *clearly erroneous* assumption that in order to be eligible for membership in Little Hunting Park one is required to own property within a prescribed geographic area (Supp. App. B15). The record of the *Sullivan* case shows that out of an authorized membership of 600, 133 members resided in areas outside of the prescribed area at the time they acquired membership, and there is no evidence that at the time of acquiring membership any of them owned property in that area (A. 84). A similar situation exists with respect to Wheaton-Haven which allows persons residing outside the three-quarter mile eligibility area to join upon the recommendation of a member as long as such persons do not exceed 30 percent of the total membership (*supra*, pp. 4-5).<sup>15</sup>

3. The court of appeals made the *clearly erroneous* assumption that Wheaton-Haven has a greater degree of "exclusivity" than Little Hunting Park, which distinguishes

---

<sup>15</sup> Contrary to the court of appeals' supposition (Supp. App. B15, n. 17), the Little Hunting Park eligibility area was extended several times to include areas in addition to the four subdivisions specified in the by-laws (A. 82-84). Further, there is no basis for the court's the "leap to suppose" (Supp. App. B15, n. 17) that such additional areas were opened by the same developers who had opened the original four. As shown above, the subdivisions surrounding Little Hunting Park were built long before the recreation association was organized, and builders had nothing to do with its formation.

this case from *Sullivan* and gives Wheaton-Haven license to discriminate against Negroes. The court relies on the fact that in Wheaton-Haven's 11-year history one applicant for membership was rejected (Supp. App. B20-B21). The court, however, completely ignores the fact from the *Sullivan* record, which was brought to its attention, that in the 12 years of Little Hunting Park's existence *one applicant for membership was also rejected* (A. 79).<sup>16</sup>

4. The court of appeals made the *clearly erroneous* finding that the option to buy a membership in Wheaton-Haven which the purchaser of a home obtains when his vendor resigns his membership is "utterly without use or value" (Supp. App. B13). The court arrived at this finding by erroneously relying on the unsubstantiated claim of defendant's counsel at oral argument that Wheaton-Haven's membership had been 260 families for several years, less than its maximum limit of 325 (Supp. App. B2, n. 1). The Court reasoned that the option has no value unless the membership rolls are full. When it was pointed out in the petition for rehearing that the membership rolls were full to the 325 maximum in the spring of 1968 when Dr. Press sought membership, and that he would have been placed on the waiting list, if he had not been discriminated against, the court corrected its findings to reflect full membership at that time (Supp. App. B30; A. 88, 92, 105-106). However, the court did not alter its conclusion that the option is of no use or value.

---

<sup>16</sup> The court of appeals, in Part III of its opinion, cited various features of Wheaton-Haven as "indicators of its private nature" (B18). Every one of the factors referred to, however, is also characteristic of Little Hunting Park, which was held by this Court not to be a private club.

The court's adherence to its conclusion, despite the demonstrated error of its underlying factual finding illustrates the erroneous approach taken by the court to this case. Its opinion is based on previously arrived at determinations, and facts were fashioned to provide their justification. In actuality, the question of whether Wheaton-Haven's membership rolls are full, or not full, at any given time has nothing to do with whether the purchase of a membership share involves contractual and property rights falling under the protection of 42 U.S.C. §§1981, 1982. However, by seizing on this and other irrelevant factors in analyzing this case and *Sullivan*, the court relied upon wholly invalid grounds for distinguishing the two cases.

## II. WHEATON-HAVEN'S RACIALLY DISCRIMINATORY POLICIES VIOLATE THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. §2000a)

Title II of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000a) prohibits racial discrimination in "any place of public accommodation," which is defined to include any "place of entertainment" if its "operations affect commerce". In *Daniel v. Paul*, *supra*, 395 U.S. 298, the Court held that a recreational establishment in which persons are not passive spectators, but are direct participants, is a "place of entertainment" within the meaning of the statute. The Court also held in *Daniel* that recreational equipment and apparatus originating out of the state constituted "sources of entertainment which move in commerce" for the purposes of subsection (c)(3) of the statute. In reaching the latter conclusion, the Court adopted the view previously taken by the Court of Appeals for the Fifth Circuit that the phrase "move in commerce" in subsection (c)(3) includes sources of entertainment, such as equipment and



supplies, which had moved in interstate commerce but which have come to rest at the place of entertainment. See *Miller v. Amusement Enterprises, Inc.*, 394 F.2d, 342, 351-352 (C.A. 5, 1968). Accord: *Scott v. Young, supra*, 421 F.2d at 144 (C.A. 4). *United States v. Central Carolina Bank & Trust Co.*, 431 F.2d 972 (C.A. 4, 1970).

In the instant case, as shown *supra*, p. 5, the Wheaton-Haven pool was constructed by a contractor from outside the State of Maryland and the operations of the pool involve the use of machinery and equipment manufactured in other states. Hence, there can be no question under the relevant authorities that the necessary link to interstate commerce is present. *Daniel v. Paul, supra*; *Scott v. Young, supra*.<sup>17</sup>

The Civil Rights Act of 1964 has a specific provision exempting from coverage "a private club or other establishment not in fact open to the public." Consistent with its holding that Wheaton-Haven is not subject to the Act of 1866 because of its status as a private club, the court below held that the Act of 1964 similarly is inapplicable because of the private club exemption. This Court's holding in *Sullivan v. Little Hunting Park*, and the discussion *supra*, pp. 20-27, amply demonstrate, we believe, that Wheaton-Haven lacks the degree of exclusiveness sufficient to exempt it from coverage of the 1964 Act. Nor can it

<sup>17</sup> The performance of services by a contractor from another state suffices to bring a facility within the scope of interstate commerce. *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U.S. 694, 699 (1951); *National Labor Relations Board v. National Survey Service*, 361 F.2d 199, 203-204 (C.A. 7, 1966), and cases cited; *National Labor Relations Board v. Local 1423, United Brotherhood of Carpenters*, 238 F.2d 832, 835 (C.A. 5, 1956); *National Labor Relations Board v. The Austin Co.*, 165 F.2d 592, 594 (C.A. 7, 1947).



be maintained that Wheaton-Haven is "not in fact open to the public." For the record shows that it is open to everyone residing within the three-quarter mile radius which it serves. The numerical limit on memberships to 325 families does not compel a contrary conclusion, for that is merely a means of preventing overcrowding of the facilities. The observance of such a limitation in the interest of health and safety is no more indicative of private club status for Wheaton-Haven than it is for a theatre or restaurant which similarly limits its number of patrons. Nor is it significant that Wheaton-Haven requires payment of an annual fee, rather than individual admission charges, for the use of its facilities. The fact is that the Wheaton-Haven pool is "open to any white individual" or family residing within the prescribed area "who can afford the yearly membership rates." *Nesmith v. Y.M.C.A. of Raleigh, N.C.*, *supra*, 397 F.2d at 101 (C.A. 4).

### CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to remand to the district court for further appropriate proceedings.<sup>18</sup>

---

<sup>18</sup> Since the district court took no evidence on the question of damages, this issue, as well as the liability for damages of individual directors of Wheaton-Haven, requires a further hearing. It is clear that an award of monetary damages is an appropriate remedy for violations of 42 U.S.C. §§1981, 1982. *Sullivan v. Little Hunting Park*, *supra*, 396 U.S. at 238-240; *Lee v. Southern Home Sites Corp.*, *supra*, 429 F.2d at 293-295 (C.A. 5); *Smith v. Sol D. Adler Realty Co.*, *supra*, 436 F.2d at 350-351 (C.A. 7); *Knight v. Auciello*, *supra*,  
(continued)

Respectfully submitted,

ALLISON W. BROWN, JR.

Suite 501, 1424 - 16th St., N.W.  
Washington, D.C. 20036

RAYMOND W. RUSSELL

22 West Jefferson Street  
Rockville, Maryland 20850

SAMUEL A. CHAITOVITZ

30 W. 60th Street  
New York, N.Y. 10023

*Of Counsel:*

MELVIN L. WULF

American Civil Liberties Union  
156 Fifth Avenue  
New York, N.Y. 10010

*Attorneys for Petitioners*

June 1972.

---

<sup>18</sup> (continued) 453 F.2d 852 (C.A. 1); *Brown v. Ballas*, *supra*, 331 F. Supp. at 1037 (N.D. Tex.); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146, 1149 (N.D. Ill., 1972). Moreover, on the basis of the complaint's allegations, the directors who participated in the discrimination against petitioners are liable for damages, along with the corporation, based on their roles in the wrongful conduct. See *National Cash Register Co. v. Leland*, 94 Fed. 502, 508-511 (C.A. 1, 1899), cert. denied, 175 U.S. 724; *Trounstone v. Bauer, Pogue & Co.*, 144 F.2d 379, 382 (C.A. 2, 1944), cert. denied, 323 U.S. 777; *Hitchcock v. American Plate Glass Co.*, 259 Fed. 948, 952-953 (C.A. 3, 1919); *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-409 (C.A. 10, 1958); *American Universal Insurance Co. v. Scherfe Insurance Agency*, 135 F. Supp. 407, 415-416 (S.D. Iowa, 1954).

(continued)

---

18 (continued)

One director, Richard E. McIntyre, who has been separately represented in this litigation, argues that the case should be dismissed as to him because he did not agree with the board of directors' racial policies and because he did not participate in the discrimination. This, of course, is a matter for determination upon the taking of evidence in the trial court. In any event, McIntyre's deposition shows that he knew of Dr. and Mrs. Press' desire to become members, that he told them they were unacceptable to the board because of their race, and that he never made any formal move at a board meeting to admit them to membership (A. 104-105). In addition, at one board meeting in the summer of 1968, when Wheaton-Haven's guest policy was under discussion, McIntyre admittedly, made a motion "to bar all Negro guests" (A. 116). McIntyre was at the board meeting on July 20, 1968, when the vote was taken to adopt the racially discriminatory guest policy. He claims he did not vote, but the official minutes of the meeting record him as being present and state that the vote for the guest policy was *unanimous* (A. 41-42).

FILED  
JUL 3 1972  
MICHAEL HODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

No. 71-1136

MURRAY TILLMAN, ET AL., *Petitioners*

v.

WHATON-HAVEN RECREATION ASSOCIATION, INC.,  
ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Fourth Circuit

BRIEF ON THE MERITS FOR MONTGOMERY COUNTY,  
MARYLAND, AS AMICUS CURIAE

RICHARD S. McKEERON  
*Acting County Attorney for  
Montgomery County,  
Maryland*

ALFRED H. CARTER  
*Deputy County Attorney*

WILLIAM J. CHEN, JR.  
*Assistant County Attorney*  
*Attorneys for Amicus Curiae*  
County Office Building  
Rockville, Maryland 20850  
279-1346

# INDEX

	Page
Lower Court Opinions .....	1
Jurisdiction .....	2
Amicus Curiae Authority .....	2
Question Presented .....	2
Statute Involved .....	3
Statement .....	5
Summary of Argument .....	12
Argument:	
The District Court and the U. S. Court of Appeals erred in holding Wheaton-Haven Recreation Asso- ciation, Inc. to be a private club .....	12
Conclusion .....	30

## CITATIONS

### CASES:

<i>Bell v. Kenwood Golf and Country Club, Inc.</i> , 312 F. Supp. 753 (D. Md. 1970) .....	16, 17, 20, 21, 22
<i>Burton v. Wilmington Parking Authority</i> , 365 U.S. 715, 81 S. Ct. 856 (1961) .....	29
<i>Castle Hill Beach Club v. Arbury, N. Y.</i> , 2 N.Y. 2d 596, 162 N.Y.S. 2d 1, 142 N.E. 2d 186 (1957) .....	17, 18
<i>Clover Hill Swimming Club v. Goldsboro</i> , 47 N.J. 25, 219 A. 2d 161 (1966) .....	17, 18, 21, 22, 25, 28
<i>Daniel v. Paul</i> , 395 U.S. 298 (1969) .....	15, 20
<i>Eger v. Stone</i> , 253 Md. 533, 253 A. 2d 372 (1969) .....	7
<i>Heaps v. Cobb</i> , 185 Md. 372, 45 A. 2d 73 (1946) .....	7
<i>Miller v. Amusement Enterprises, Inc.</i> , 394 F. 2d 342 (5th Cir., 1968) .....	15
<i>Montgomery County Citizens' League v. Greenhalgh</i> , 253 Md. 151, 252 A. 2d 242 (1969) .....	7, 14
<i>Moose Lodge No. 107 v. Irvis</i> , — U.S. —, 40 U.S.L.W. 4715 (U.S. June 13, 1972) .....	28, 29
<i>Nesmith v. Young Men's Christian Ass'n of Raleigh</i> , N.C., 397 F. 2d 96 (4th Cir., 1968) .....	15, 16, 18, 23, 24, 27, 28
<i>Scott v. Young</i> , 421 F. 2d 143 (4th Cir., 1970), Cert. Denied, 398 U.S. 929 (1970) .....	16
<i>Stout v. Young Men's Christian Ass'n of Bessemer</i> , Alabama, 404 F. 2d 687 (5th Cir., 1968) .....	16, 18, 28
<i>Sullivan v. Little Hunting Park</i> , 396 U.S. 229 (1969) .....	17, 21, 23, 26, 27
<i>Tauber v. County Board of Appeals</i> , 257 Md. 202, 262 A. 2d 513 (1970) .....	14



	Page
<i>Tillman, et al. v. Wheaton-Haven Recreation Association, Inc.</i> , 451 F. 2d 211 (4th Cir., 1971) .....	1
<i>United States v. Clarksdale King &amp; Anderson Co.</i> , 288 F. Supp. 792 (N.D. Miss., 1965) .....	17, 23, 28
<i>United States v. Jordan</i> , 302 F. Supp. 370 (E.D. La., 1969) .....	16, 17, 18, 23, 25
<i>United States v. Richberg</i> , 398 F. 2d 523 (5th Cir. 1968) .....	15, 16, 18, 19, 20, 23, 30
<i>Williams v. Rescue Fire Company</i> , 254 F. Supp. 556 (D. Md. 1966) .....	17, 18, 25, 28
<b>FEDERAL STATUTES:</b>	
United States Code, Title 28, Sec. 1254(1) .....	2
Civil Rights Act of 1964, 78 Stat. 243 (1964), 24 U.S.C., Sec. 2000a .....	2, 3, 4, 5, 6, 12, 15, 19, 21, 30
Civil Rights Act of 1866, 42 U.S.C., Secs. 1981 and 1982 .....	2, 3, 6
Internal Revenue Code, 26 U.S.C., Sec. 501(c)7 .....	11
<b>STATE CONSTITUTION AND STATUTES:</b>	
Constitution of Maryland, Art. XI-A .....	2
Annotated Code of Maryland, 1957 Edition, as amended, Art. 25-A (1966 Replacement Volume) ..	2
Annotated Code of Maryland, 1957 Edition, as amended, Art. 81, Sec. 288(d)(8) (1969 Replacement Volume) .....	11
<b>COUNTY CHARTER AND ORDINANCES:</b>	
Charter of Montgomery County, Maryland, Art. 2, Sec. 213 .....	2
Montgomery County Code 1965, Sec. 77-1, et seq., as amended by Chap. 18, Laws of Montgomery County 1968 and Chap. 33, Laws of Montgomery County 1969 .....	14
Montgomery County Code 1965, as amended, Sec. 111-37n .....	13
Montgomery County Code 1965, as amended, Sec. 111-37z-4 .....	10, 11, 13
<b>MISCELLANEOUS:</b>	
Rule 42(4) of the Rules of the Supreme Court of the United States .....	2
<i>Tillman, et al. v. Wheaton-Haven Recreation Association, Inc.</i> , Montgomery County (Md.) Commission on Human Relations, No. P.A.-6, June 3, 1969 ....	7
1 Race Rel. L. Survey 231 (Jan. 1970) (Vanderbilt Univ. School of Law) .....	7



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

---

No. 71-1136

---

MURRAY TILLMAN, ET AL., *Petitioners*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC.,  
ET AL., *Respondents*

---

On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Fourth Circuit

---

BRIEF ON THE MERITS FOR MONTGOMERY COUNTY,  
MARYLAND, AS AMICUS CURIAE

---

**LOWER COURT OPINIONS**

The opinion of the U.S. Court of Appeals is reported as *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 451 F. 2d 1211 (4th Cir. 1971), and a copy of this opinion is reproduced as Appendix B to the Petition for Writ of Certiorari. The opinion of the District

Court is unreported, but a copy of this opinion is reproduced as Appendix C to the Petition for Writ of Certiorari.

### **JURISDICTION**

The Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). The judgment of the U.S. Court of Appeals was entered on October 27, 1971. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was duly filed, but was denied by the U.S. Court of Appeals on December 16, 1971 (Reproduced as Appendix D of the Petition for Writ of Certiorari).

### **AMICUS CURIAE AUTHORITY**

The authority of Montgomery County, Maryland, to participate in these proceedings is founded on Rule 42(4) of the Rules of the Supreme Court of the United States. Montgomery County, Maryland, is a political subdivision of the State of Maryland, and the counsel under whose name this Brief is filed are the law officers of Montgomery County in whom participation is authorized. Article XI-A of the Constitution of Maryland; Article 25A of the Annotated Code of Maryland, 1957 Edition (1966 Replacement Volume); Article 2, Section 213, of the Charter of Montgomery County, Maryland.

### **QUESTION PRESENTED**

Whether the U.S. Court of Appeals erred in holding a community recreation association to be a private club and, hence, exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C., Secs. 1981, 1982 and 2000a), despite the fact that this Court in a previous case (*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969)) held that an association with

virtually identical characteristics could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.<sup>1</sup>

### STATUTE INVOLVED

The statutory provision involved is Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a).

Section 2000a provides:

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building

<sup>1</sup> Because the particular interest of Montgomery County in the decisions of the lower courts does not involve a question based on an application or interpretation of Sections 1981 and 1982 of Title 42 of the United States Code, these laws are not considered in this Brief. Only Section 2000a of Title 42 of the United States Code is involved in this Brief.

which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Operations affecting commerce; criteria; "commerce" defined.

(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or

there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States or between the District of Columbia and any State or between any foreign country or any territory or possession and any State or the District of Columbia or between points in the same State but through any other State or the District of Columbia or a foreign country.

#### Support by State action.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by Officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

#### Private establishments.

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

#### STATEMENT<sup>1</sup>

The Petitioners instituted suit in Federal District Court (Civil Action No. 21294), Maryland District,

<sup>1</sup> The facts set forth below are based upon the District Court's findings, as modified by the Court of Appeals, with certain additional comments by Montgomery County, Maryland, as indicated in footnotes.



against the Respondents for violation of the Civil Rights Act of 1966 (42 U.S.C., Secs. 1981 and 1982) and Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a). The Respondents are Wheaton-Haven Recreation Association, Inc. (herein "Wheaton-Haven" or "Respondent") and thirteen individuals who were officers and directors of Wheaton-Haven at times material herein. The Petitioners and the Respondents stipulated to the facts. Montgomery County did not participate in the District Court proceedings. The case was heard on cross Motions for Summary Judgment, as well as Petitioners' Motion for Preliminary Injunction. On July 8, 1970, the District Court rendered a verdict in favor of the Respondents. In ruling in favor of the Respondents, the District Court (Northrop, J.) found that the swimming pool facility here in question was operated as a private club and, therefore, no violation of the aforementioned Federal laws existed.<sup>3</sup> The Petitioners appealed to the U.S. Court of Appeals for the 4th Circuit (Case No. 14957). The Court of Appeals (Haynsworth, Boreman, Butzner, J.J.) affirmed the judgment of the District Court with one judge dissenting (Butzner, J.). On Petition for Rehearing, rehearing was denied, but Judges Winter and Craven joined in the dissent. The Petitioners sought relief from that affirmance by filing a Petition for Writ of Certiorari to this Court on March 13, 1972. On May 15, 1972, the Court granted the Petition for Writ of Certiorari.

---

<sup>3</sup>The District Court found that Wheaton-Haven came within the purview of Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a), but that it was a "private club" within the meaning of 42 U.S.C., Sec. 2000a(e) (Appendix C to the Petition for Writ of Certiorari).



The Federal suit was instituted after the Montgomery County Commission on Human Relations, through its Panel on Public Accommodations, declared Respondent, Wheaton-Haven Recreation Association, Inc., to be a public accommodation under County law and not entitled to an exemption as "distinctly private in nature." *Tillman, et al. v. Wheaton-Haven Recreation Association, Inc.*, Montgomery County, Maryland Commission on Human Relations, No. P.A. 6, June 3, 1969; See 1 Race Rel., L. Survey 231 (1970) (Vanderbilt Univ. School of Law). Enforcement of a Commission cease and desist order is presently awaiting Maryland State Court action.<sup>4</sup>

Wheaton-Haven, a non-profit Maryland corporation, was created in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Montgomery County, Maryland.<sup>5</sup> The pool, constructed in the 1958-59 season, was financed by subscriptions for

<sup>4</sup> The Panel's "Opinion, Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order" are reproduced herein as Appendix A. The County requested the Court of Appeals to take judicial notice of this document. The Court of Appeals did address itself to this document, and it is part of the record. The document is an administrative decision rendered by a governmental agency pursuant to the laws of Montgomery County as implementing the full and plenary police powers of the State of Maryland. *Montgomery Citizens League v. Greenleaf*, 253 Md. 151, 252 A. 2d 242 (1969). Such an administrative decision is entitled to a presumption of validity and full probative value. *Eger v. Stone*, 253 Md. 533, 253 A. 2d 372 (1969); *Heape v. Cobb*, 185 Md. 372, 45 A. 2d 73 (1946).

<sup>5</sup> On September 23, 1958, Wheaton-Haven secured a special zoning exception as a "community swimming pool" as distinguished from a special exception for a "private club". The Opinion of the County agency that granted the special exception, the Montgomery County Board of Appeals, is reproduced herein as Appendix B.

membership collected from persons residing in the area.<sup>6</sup> The pool presently charges a \$375 initiation fee and annual dues of \$50-\$60. As set out in the bylaws of the corporation, membership is open to bona fide residents of the area within a three-quarter mile radius of the pool. Members may be taken from the general public outside the three-quarter mile radius upon the recommendation of a member as long as the percentage of members from outside the area does not exceed 30 percent of the membership.<sup>7</sup> In either event, applicants for membership must be approved by an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose. Membership, which is by family units rather than on an individual basis, is limited to 325 family units, but at no relevant time has the membership been filled so that, in effect, membership is not limited to the geographic area. In the event a member sells his property, the purchaser has the first option to purchase the seller's membership in the pool. The membership turnover procedure requires the seller to resign and the buyer to apply for membership; the buyer's application being subject to the approval of the Board of Directors. Presently Negro families do

---

<sup>6</sup> The membership solicitation was found to be active, open and unqualified. Circulars and government facilities were used to effect solicitation of membership. No Negroes lived in the area at the time and, therefore, no membership qualifications were employed or interviews conducted. A large sign was posted at the pool site to attract new members. Panel Findings Nos. 7, 12 and 17, App. 4a.

<sup>7</sup> There is no evidence of record as to what portion of this 30 percent actually constitutes non-residents of the area.

reside within the three-quarter mile area,<sup>8</sup> and, while none of those families are members of the pool, there is no indication that any of them, other than the Petitioner Press, has applied for membership. Wheaton-Haven records reveal that, prior to the application involved herein, only one application, that of a white man, has been rejected by the association in its eleven-year history.<sup>9</sup>

Only members and their guests are admitted to the pool. The general public is not admitted to the Wheaton-Haven facility unless as a guest and an entrance fee is paid.

Dr. and Mrs. Harry C. Press, two of the Negro Petitioners, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of the pool and, therefore, had no interest in the pool which he could transfer. In the spring of 1968, however, Dr. Press sought to obtain an application for membership in the pool from members of the pool's Board of Directors. Wheaton-Haven refused to furnish him with an application. The stipulated reason for not sending him an application was that Dr. Press is a Negro.

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. Around July 19, 1968, the Tillmans brought Grace Rosner, a negro woman, to the pool as a guest. On July 20, 1968, Wheaton-Haven promulgated a rule that limited guests to relatives of members.

<sup>8</sup> The community had integrated by 1967. Panel Finding No. 15, Apx. 6a.

<sup>9</sup> For purposes of this appeal, Montgomery County accepts this fact although the Commission found no Caucasian was ever rejected. Panel Finding No. 16, Apx. 6a.

On July 24, 1968, and at all times since that date, Wheaton-Haven has refused to permit the Tillmans to bring Mrs. Rosner to the pool as a guest. The limitation on guests was precipitated by the admission of Mrs. Rosner on July 19, and supposedly was intended to keep down the burgeoning number of guests.<sup>10</sup> The guest rule was a sham to exclude Negroes (See Panel Finding No. 20, Apx. 6a-7a).

The pool facility was constructed pursuant to the "special exception" granted by the Montgomery County Board of Appeals.<sup>11</sup> Prior to granting the special exception, the Board required Wheaton-Haven to demonstrate its financial responsibility by submit-

---

<sup>10</sup> Interrogatories Nos. 29 and 31 of Petitioners asked whether in 1968 and at the present time, Wheaton-Haven's policy has been to deny admission of Negroes to its facilities as the guests of members. The answer of Respondents to both interrogatories is: "We did not have a written policy but we did have an understanding to discourage Negroes because we considered ourselves a private pool." The deposition of director McIntyre (a Respondent), filed with the District Court, discloses beyond question that the relatives-only guest policy adopted on July 20, 1968, was intended to exclude Negroes as guests. See also the Court of Appeals finding, 451 F.2d at 1213.

<sup>11</sup> See footnote 5, *supra*. The provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955, now Sec. 111-37x-4, Montgomery County Code 1965, as amended. In the ordinance, the Council stated. ". . . this action sets up the community swimming pools as a special exception . . . Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefited by such development." (Admis. Nos. 1, 2, Pl. Exh. 2 in the District Court).

ting evidence that 60 percent of its projected construction costs were obligated or subscribed.<sup>12</sup>

Wheaton-Haven does pay state and local real estate taxes, but is exempt from state and federal income taxes under the Annotated Code of Maryland, 1957 Edition, Article 81, Sec. 288(d)(8) (1969 Replacement Volume) and the Internal Revenue Code, 26 U.S.C., Sec. 501(c)(7), exempting non-profit, member-owned and controlled recreational facilities.

It should be noted that the Panel on Public Accommodations of the Montgomery County Commission on Human Relations, in reviewing the history and actions of Wheaton-Haven, had the benefit of the application file of the Montgomery County Board of Appeals, and that part of the Board's file consisted of a complete transcript of the proceedings before it. The duplicity of the Respondent was well documented. Probably, in 1958, no racial exclusiveness was considered. The neighborhood was not well integrated until 1967 (Panel Finding No. 15, Apx. 6a). The Respondent's Bylaws, adopted in 1958, had no racial covenants or restrictions on membership (Panel Finding No. 14, Apx. 6a).

<sup>12</sup> Wheaton-Haven also had the burden of showing the special zoning exception was in the public interest in that it did not adversely affect the present and future character and development of the community. Sec. 111-37z-4, Montgomery County Code 1965, as amended. In that regard, Wheaton-Haven presented evidence to the Board that the proposed facility was in lieu of a County facility to serve an imperative recreational need of the community, that the facility was needed for youths as a deterrent to juvenile delinquency, that the facility was for a community recreational need and not intended for private social functions, and that the facility would be advantageous and a public benefit to the community at large. Panel Finding No. 6, Apx. 4a.



However, as time went by, it became impossible to maintain racial segregation. It was then that overt opposition to Negroes began and it was then that the Respondent betrayed its public trust.

### **SUMMARY OF ARGUMENT**

Under the laws of the United States and local laws of Montgomery County, Maryland, Wheaton-Haven Recreation Association, Inc., is a public accommodation which cannot discriminate on the basis of race.

The findings and decisions of the U. S. Court of Appeals for the Fourth Circuit and the U. S. District Court for the District of Maryland that Wheaton-Haven Recreation Association, Inc., qualifies under Title II of the Civil Rights Act of 1964, 42 U.S.C., Sec. 2000a, as a private club sanction racial discrimination as prohibited by that law and destroy the legitimate enforcement and administration of Montgomery County's local public accommodations and zoning laws.

### **ARGUMENT**

It may well be true that Wheaton-Haven considers itself at this time a private club or, at least, that many of its members consider it to be a private club. Consistent with that desire, Wheaton-Haven, in recent years, has taken on a few accoutrements of a private organization. These contrived emblazonments, however, are not determinative of this controversy. They belie the factual history of the swimming pool facility. In attempting to metamorphose its genetic antecedents, Wheaton-Haven has repudiated its charter obligations which Montgomery County is seeking to reinstate.

The gravamen of Montgomery County's complaint against Wheaton-Haven is that it has defaulted on its



representations and responsibilities to the County. In 1958, the organization sought authority from the County to construct and use a community swimming pool. To this end, the organization secured a special zoning exception from the Montgomery County Board of Appeals for a "community pool," Sec. 111-37z-4, Montgomery County Code 1965, as amended. In addition to certain financial prerequisites, the Board had to find that the proposed use would be in the *public interest* in that it would not adversely affect the present or future character or development of the community. Wheaton-Haven presented extensive testimony that the facility was proposed in lieu of a county-built facility to meet an imperative community recreational need, that the facility was needed for community youths as a deterrent to juvenile delinquency, that the facility was for a community recreational purpose and not intended for social functions, and that the facility would be advantageous and beneficial to the community at large (Appendix A). The facts are clear that Wheaton-Haven represented that it was meeting a need for a community service which the local governmental authorities were unable to provide. No private facility was created.

Wheaton-Haven chose its status as a community pool over another existing zoning category designated as a "private club," Sec. 111-37n, Montgomery County Code 1965, as amended. After Wheaton-Haven received for eleven years the benefits and favored tax status of a community pool, the lower courts have now subverted the purposes of the Montgomery County Zoning Ordinance by converting Wheaton-Haven to a private club. The Montgomery County Council was cognizant of the zoning distinction between private clubs and community swimming pools when it declared

in 1962 that swimming pools were classified as public accommodations subject to the County anti-discrimination provisions. (Appendix C, Apx. 24a). The lower courts failed to recognize the significance of these local laws and, in this failure, honored form over substance. Cf. *Tauber v. County Board of Appeals*, 257 Md. 202, 282 A.2d 513 (1970) (imposing burden on applicant to meet public interest requisites).

Wheaton-Haven's present policy of racial segregation abrogates its duty as a public facility and adversely affects the future development of the community in that Negroes are discouraged from migration into the community; thus, effectively creating a racial zoning ordinance without County sanction and which is inconsistent with and in derogation of the County's public policy established by enactment of a local fair housing law.<sup>18</sup> See *Montgomery Citizens League v. Greenhalgh*, *supra*. There is a very real relationship between the opportunity for a Negro, or any other individual of a racial, color, religious or national origin minority group, to obtain housing in any geographic area and the accessibility of neighborhood recreational facilities. Everyone knows that the Wheaton-Haven swimming pool is open to everyone in its neighborhood—at least everyone who is white. Neighborhood swimming pools which are closed to blacks inhibit their freedom and right to move into an integrated neighborhood. The County has a fair housing and public accommodations law which is reflective of the County's interest and concern in securing free and equal treatment of all its citizens. This interest and concern is

---

<sup>18</sup> Sec. 77-1, et seq., Montgomery County Code 1965, as amended by Chap. 18, Laws of Montgomery County 1968 and Chap. 83, Laws of Montgomery County 1969. This law is reproduced herein as Appendix C.

consistent with federal law. It is in light of this mutuality of interest that the impact of the lower courts' decisions must be viewed.

The Supreme Court has conclusively held the provisions of the Federal Public Accommodations Law, 78 Stat. 243 (1964), 42 U.S.C., Sec. 2000a, to cover swimming areas and associated recreational facilities. *Daniel v. Paul*, 395 U.S. 298 (1969). The law is to be construed liberally and read broadly. *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968). From this broad coverage a narrow exemption was carved under Sec. 2000a(e) of the law for *bona fide* social, fraternal, civic and other organizations which select their own members. *United States v. Richberg*, 398 F.2d 523 (5th Cir. 1968). To qualify for this exemption, the burden is upon Wheaton-Haven to establish that it is, *de facto* and not *de jure*, a private club. *Nesmith v. Young Men's Christian Association of Raleigh, N.C.*, 397 F.2d 96 (4th Cir. 1968).

In determining whether an establishment is in fact a private club, *there is no simple test*. A number of variables must be examined in the light of the Act's clear purpose of protecting only 'the genuine privacy of private clubs . . . whose membership is genuinely selective . . . .'. As one commentator observed, 'Where there is a large membership or a policy of admission *without any kind of investigation of the applicant*, the logical conclusion is that membership is not selective. . . .

\* \* \*

[S]erving or offering to serve all the members of the white population within a defined geographical area is certainly inconsistent with the nature of a truly private club." *Nesmith v. Young Men's Christian Association of Raleigh, N.C.*, *supra*, at 101-102 (emphasis added).

The variables are considerable and no one criteria alone is fatal to or a conclusive determinant of the claimed exemption without consideration of the totality of facts. *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753 (D. Md. 1970). A comprehensive, but not exclusive, analysis of these variables is recited in *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969), where the District Court listed seven broad elements for consideration:

1. Membership genuinely selected on a reasonable basis;
2. Membership control over operation and property;
3. Manner of creation including advertising and solicitation of charter members;
4. Purpose of organization as it relates to social, fraternal or civic functions;
5. Formalities of organization;
6. Extent of invitation to public manifested by advertising, telephone listings, initiation fees, dues;
7. Use of private club tax exemptions and credit extended to members.

Of all these variables, the most frequently used factual test is whether the membership is genuinely selective. *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970) *Cert. Denied*, 398 U.S. 929 (1970); *United States v. Jordan*, *supra*; *Stout v. Young Men's Christian Association of Bessemer, Alabama*, 404 F.2d 687 (5th Cir. 1968); *United States v. Richberg*, *supra*; *Nesmith v. Young*

*Men's Christian Association of Raleigh, N. C., supra*; *Williams v. Rescue Fire Company*, 254 F. Supp. 556 (D. Md. 1966); *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966); *United States v. Clarksdale King & Anderson Co.*, 288 F. Supp. 792 (N.D. Miss. 1965); *Castle Hill Beach Club v. Arbury*, N.Y., 2 N.Y.2d 596, 162 N.Y.S.2d 1, 142 N.E.2d 186 (1957). Moreover, this factual test has become the conclusive law of the land.

The Virginia trial court rested on its conclusion that Little Hunting Park was a *private social club*. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographical area, *there being no selective element other than race*. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969) (emphasis added).

Elements of the factual test that membership be genuinely selective on a reasonable basis have been repeatedly articulated and determined in numerous court cases. Wheaton-Haven has failed to meet any of these indicia of exclusivity. These elements are as follows:

1. Whether members, *in fact*, control the membership procedure through actual notice of prospective applicants, power of blackball and membership revocation. *Bell v. Kenwood Golf and Country Club, Inc., supra*; *United States v. Jordan, supra*; *Clover Hill Swimming Club v. Goldsboro, supra*; *Williams v. Rescue Fire Company, supra*; *United States v. Clarksdale King & Anderson Co., supra*; *Castle Hill Beach Club v. Arbury, N. Y., supra*.
2. Whether prospective members are required to be recommended for membership by one or more



existing members. *Stout v. Young Men's Christian Association of Bessemer, Alabama, supra*; *United States v. Jordan, supra*.

3. Whether there is any limit on the number of members other than the capacity of the facility. *Nesmith v. Young Men's Christian Association of Raleigh, N. C., supra*; *United States v. Jordan, supra*; *Clover Hill Swimming Club v. Goldsboro, supra*.
4. Whether there is any manifestation of standards for membership qualifications including such factors as articulated personal requirements (social position, reputation, residence), rejection rates, extent of applicant investigation, reference requirements, time period for approval, rates of membership revocation, and formalities of initiation (fees, dues, ceremonies, documents). *United States v. Jordan, supra*; *Stout v. Young Men's Christian Association of Bessemer, Alabama, supra*; *United States v. Richberg, supra*; *Nesmith v. Young Men's Christian Association of Raleigh, N. C., supra*; *Williams v. Rescue Fire Company, supra*; *Castle Hill Beach Club v. Arbury, N. Y., supra*.

The "Opinion Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order," Appendix A, of the Montgomery County Commission on Human Relations, Panel on Public Accommodations, is a document which accurately chronicles the creation and operation of the Respondents' swimming pool facility. The document is the end-product of an adversary hearing before a County administrative agency



wherein all federal and state constitutional rights were respected and safeguarded. The Respondents were afforded a complete opportunity to present witnesses, cross-examine witnesses, introduce evidence, and oppose the introduction of evidence. The hearing utilized all the flexibility and expertise indigenous to the administrative process while affording all participants maximum protection of all their rights.

The document accurately relates the operative factual background which is dispositive of the question presented herein.

It demonstrates that the recognized elements of exclusivity never were present in the activities of Wheaton-Haven Recreation Association, Inc., until it embraced a policy of racial segregation *post-factum*. The evaluation of the lower Court's findings which follows, *infra*, will further demonstrate that these elements were not present or that they were adopted to justify Wheaton-Haven's aspiration to racial segregation.

The determination of whether or not an organization is entitled to the "private club" exemption contained in subsection (e) of Section 2000a of Title 42 of the U.S. Code is a question of law. *United States v. Richberg, supra*. Here, the underlying facts are not in dispute. Unfortunately, the findings of the Court of Appeals reflect such an erroneous misinterpretation of the undisputed facts in this controversy that a detailed examination of the findings must be undertaken. This is necessary because the unprecedented findings of privacy by the lower court are clearly erroneous or unsupported or are mere superficial variables which neither collectively, nor individually, can be held, as

a matter of law, to be conclusive. The findings of the Court of Appeals were as follows:

1. "Its structure is that of a private association, though that is not of great weight, since it is relatively easy for a place of public accommodation to take on the formal features of a club without changing its nature. Unlike every organization which has ever been held to be a 'sham' private club, Wheaton-Haven is owned, operated and controlled entirely by its membership." 451 F. 2d at 1219-1220.

The Court was correct in stating that no great weight can be given to the "structure" of Wheaton-Haven. This consideration together with "ownership" are transparent formalities of a private club which fail to look beyond the corporate shell to the real purpose of the organization, i.e., to provide a community swimming facility to all white persons living within a prescribed geographic area. *United States v. Richberg, supra*. Here, the Court adopted a variable used in *Daniel v. Paul, supra*, i.e., traditional formalities associated with a private club, self-government and member ownership. Moreover, the corollary to this rule was adopted in *Bell v. Kenwood Golf and Country Club, Inc., supra*, where the court refused to make the absence of self-government fatal to a claim for the exemption of a private club. However, this one factor of member ownership has never been held conclusive and is more than outweighed by Wheaton-Haven's open invitation to the white community as manifested by: its active and unqualified solicitation of charter members; its advertising membership availability by a large conspicuous sign posted at the pool; its superficial membership approval procedure which lacks any

meaningful interview, investigation or evaluation of membership qualifications; its low, if not negligible, rejection of whites; and its failure to make membership available to Negroes despite their presence in the community (Panel Findings Nos. 7, 12, 15, 16, 17, 18; Apx. 4a-6a).

The Court also stated that "Unlike every organization which has ever been held to be a 'sham' private club, Wheaton-Haven is *owned, operated and controlled* entirely by its membership." 451 F. 2d at 1220. It is difficult to square this statement with *Sullivan v. Little Hunting Park, supra*, wherein the membership of the facility there in question *owned* shares in the nonstock corporation that organized and *operated* the facility and, like Wheaton-Haven, was *controlled* by a board of directors. A comparative profile of both Little Hunting Park and Wheaton-Haven impels the conclusion that there is no meaningful distinction between the two facilities as far as the requirements of Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a) are concerned.

2. "It was initially financed through the initiation fees of the first members, and new members must make a comparatively heavy investment of \$375 in order to join." 451 F. 2d at 1220.

This consideration is not valid. In *Bell v. Kenwood Golf and Country Club, Inc., supra*, the initiation fees, depending on membership classification, ranged from \$600 to \$1,500. 312 F. Supp. at 755. The Kenwood Golf and Country Club is located in Montgomery County also, and it is unrealistic to state that \$375 is a "heavy investment" in Montgomery County. Similarly, in *Clover Hill Swimming Club v. Goldsboro, supra*, the initial fee was \$350 (a debenture bond).

3. "The members of the Board of Directors are required to be club members." *Id.*

No express qualification for membership exists. There is *de jure* control of the operation of facilities and selection of members. But this is not a valid consideration in light of the fact that there is no actual membership control other than an annual meeting! This point is nothing more than another meaningless traditional formality.

4. "Regular membership meetings are held, and member participation is strikingly high." *Id.*

This finding is, unfortunately, misleading. The only "regular membership meeting held" is the *annual* membership meeting. That is the only real membership participation which exists in this association. The control of the facility reposes in its directors.

5. "Substantial annual dues are charged, and members are liable for further assessments if the dues are insufficient to meet annual expenses." *Id.*

Again, *Bell v. Kenwood Golf and Country Club, Inc., supra*, is dispositive. It is absolutely unreasonable to conclude that in Montgomery County, Maryland, an annual dues of \$50-\$60 is substantial. Such a conclusion fails to recognize the reality of the operative facts. The pool facility is located in an affluent section of Montgomery County which is one of the very wealthiest counties in the United States. In *Clover Hill Swimming Club v. Goldsboro, supra*, the annual dues was \$150.

6. "Only members and their guests can use the pool. There is no way in which a non-member, by payment of an admission fee, can gain entrance." *Id.*

These two indicia are coupled because they are similar. They are mere self-serving devices which represent a bootstrap conclusion and must yield to the obvious reality that all organizations declaring themselves private clubs have so limited the use of their facilities. Despite such self-serving declarations of privacy and the restrictions on use, the courts have universally taken substance over form to determine whether there is in fact a private nature to the organization. *Sullivan v. Little Hunting Park, supra*; *United States v. Richberg, supra*; *Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra*; *United States v. Clarksdale King and Anderson Co., supra*.

7. "Nor does Wheaton-Haven publicly solicit members." *Id.*

This conclusion is erroneous. The solicitation of members by Wheaton-Haven, prior to pressures for integration, were open and notorious. There is no doubt as to Wheaton-Haven's open invitation to the white community. Note subparagraph 1, *supra*; also Panel Findings Nos. 6, 7, 12, 16, 17, 18; Apx. 4a-6a. The only membership qualification was an ability to pay. Furthermore, the stated purpose of the organization was not social or fraternal, but purely to serve a community recreational need. These factors, in addition to Wheaton-Haven's inability to meet the genuine selectivity test, *infra*, would deny to the organization the private club exemption under the criteria set forth in *United States v. Jordan, supra*.



8. The Court of Appeals also deduced that Wheaton-Haven does not hold itself out in any way as serving the general public. *Id.*

This conclusion must be an attempt to neutralize *Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra*. This conclusion is possibly the most extreme example of embracing form over substance in the appeals court's decision. How can the court ignore the conduct of Wheaton-Haven as to serving the "recreational needs of the community" (Panel Finding No. 6, Apx. 4a), the indiscriminate solicitation of funds to meet construction costs (Panel Finding No. 7, Apx. 4a), the sham interviews (Panel Finding No. 12, Apx. 5a-6a), the posting of the invitation sign (Panel Finding No. 17, Apx. 6a), and the low rejection rate (Panel Finding No. 16, Apx. 6a)? There is no answer. The lower court chose to adopt certain factors (of questionable repute) and ignore undisputable facts which prove the duplicity of Wheaton-Haven.

9. The Court also reasoned that Wheaton-Haven limited its membership to a geographic area and number and that this limitation was an indicia of privacy. *Id.*

This conclusion is not meaningful in light of the local governmental practice of encouraging the creation of neighborhood community swimming pools rather than County-operated pools. As explained, *infra*, at pp. 28-29, the County does not have the financial or administrative resources to provide swimming pools for its citizenry at all appropriate geographic locations in the County. In order to meet the recreational needs of its citizenry, the County has provided a means under

its zoning laws whereby neighborhood community pools can be built under its auspices. Recreational swimming pools so created allow neighborhood groups to help themselves and the County in discharging a function and performing a service which is to benefit the public. It was by virtue of this means of creation that Wheaton-Haven came into being. Furthermore, the conclusion ignores the reality that a limit on membership to those who can be effectively served by the capacity of the facility is a normal incident of such a recreational facility, public or private. In this context, it is clear that the lower court's attraction to geographic limitations on membership is not meaningful. This concept of neighborhood swimming pools is grounded on an attempt to effectively serve a segment of the public, and not create enclaves of segregation under County auspices. *Cf. Clover Hill Swimming Club v. Goldsboro, supra*, 219 A. 2d at 165. The membership limitation has been held to be an insignificant factor and does not operate to change a public accommodation into a private one. *United States v. Jordan, supra*; *Clover Hill Swimming Club v. Goldsboro, supra*.

Further, the fact that thirty percent of the membership can be drawn from outside the geographic area of the neighborhood is irrelevant. This element also is misleading because it ignores the fact that a substantial majority, at least seventy percent of the membership, is drawn from a specified geographical area and any white person living in that area is accorded a priority for membership over the general public. It should be recognized that in *Williams v. Rescue Fire Company, supra*, it was held that a swimming pool was not afforded the private club exemption despite the fact that twenty-five percent of the membership actu-

ally resided outside the geographic area. In any event, *Sullivan v. Little Hunting Park, supra*, is dispositive of this point because the swim club there had the same provisions as here and failed to qualify as a private club.

10. The lower court also found that it was not relevant that "for zoning purposes" the name "community swimming pool" was used. *Id.*

This finding evidences the lower court's failure to consider the significance and importance of zoning laws. Zoning laws are second to no other statutory body in regulating the conduct of individuals or groups. On a local level, the power and pervasiveness of zoning laws is ominous. Possibly no other body of law contains as many "words of art." "Community swimming pool" did not mean "private swimming pool". There was provision under the County zoning laws for a "private swimming pool." Wheaton-Haven, properly, did not seek a special exception as a private swimming pool. It declared that it intended to serve the community, to serve as a deterrent to juvenile delinquency, to serve the recreational needs of the community (Panel Finding No. 6, Apx. 4a). The Montgomery County Council, in enacting the relevant zoning code provision, recognized that "community swimming pools" were to meet "community needs" (Panel Finding No. 5, Apx. 3a-4a).

11. Finally, the appeals court made a finding that Wheaton-Haven met the test of exclusivity. 451 F. 2d at 1220-1221.

As to this finding, the court failed to point to any item within the operative facts other than commenting on the rejection rate of one white applicant. The court

stated that some considerations are "implicit". This conclusion by the lower court is completely unfounded. Indeed, it is the area of selectivity that Wheaton-Haven is most vulnerable. This test is the most important one. The test is set forth in *Sullivan v. Little Hunting Park, supra* and *Nesmith v. Young Men's Christian Association of Raleigh, N.C., supra*. Wheaton-Haven admittedly possesses no articulated admission standards and performs only a superficial interview with no membership reference requirement or even a rudimentary investigation of the applicant's basic character traits, social or economic position. The rejection of one white applicant since inception (an eleven-year period) clearly manifests Wheaton-Haven's "open door" policy to the community and easily meets the ninety-nine percent acceptance of whites ratio present in *Nesmith, supra*. In *Nesmith*, five whites were rejected in a one-year period. As in *Nesmith*, Wheaton-Haven has rejected one hundred percent of Negro applicants. The appeals court erroneously allowed counsel for Wheaton-Haven to state at oral argument that other white applicants had been informally rejected. This statement is completely unfounded. There is no evidence in the record below to substantiate this self-serving testimony of Wheaton-Haven's counsel. 451 F.2d at 1221, n. 23. The testimony is in diametric conflict with the sworn answer of Wheaton-Haven to the Petitioners' interrogatory No. 17 which indicates that no one other than Dr. Press was ever denied an application form.

It also should be noted that there was no finding by either of the lower courts that the membership actually controlled the selection process. The cases are replete with findings that membership committees alone do not constitute any real manifestation that the membership

actually selects new members. *Stout v. Young Men's Christian Association of Bessemer, Alabama, supra*; *Nesmith v. Young Men's Christian Association of Raleigh, N.C.*; *Clover Hill Swimming Club v. Goldsboro, supra*; *Williams v. Rescue Fire Company, supra*; *United States v. Clarksdale King & Anderson Co., supra*.

Furthermore, the District Court's failure to consider the low ratio as a significant factor of non-privacy is inconsistent with that court's prior holding in *Williams v. Rescue Fire Company, supra*, where the court did consider the absence of rejection and low revocation ratio. The case law on this point stands for the proposition that low rejection ratios are indicative of a non-private nature. *Nesmith v. Young Men's Christian Association of Raleigh, N. C., supra*. It indeed would be hard to find a truly bona fide private club whose existence is fostered by social selectivity with such a low rejection rate.

One factor which the lower court failed to consider, and which is of paramount concern to this Amicus Curiae, is the fact that Wheaton-Haven was created to meet a local public need. The swimming pool facility was proposed in lieu of a county-built pool (Appendix B, Panel Finding Nos. 6 and 8, Apx. 4a-5a and Admis. Nos. 1, 2, Pl. Exh. 2 in the District Court). This public responsibility is a critical factor in determining the true character of the Respondent's activities. It is in this regard that Wheaton-Haven has repudiated a commitment it voluntarily assumed to serve the citizenry of Montgomery County, Maryland. This type of commitment has recently been recognized by this Court as an indicia of a public accommodation. *Moose Lodge No. 107 v. Irvis*, — U.S. —, 40 U.S.L.W.



4715 (U.S. June 13, 1972). The Respondent "discharges a function [and] performs a service that would otherwise in all likelihood be performed by the [County]." 40 U.S.L.W. at 4719. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-725 (1961). Montgomery County's challenge is not based upon an academic theory of "state action." The fact that the Respondent has received governmental consent to operate and has received tax benefits does not accurately reflect the symbiotic relationship which exists between Wheaton-Haven and Montgomery County. The *raison d'être* for the creation of the swimming pool facility was to serve the citizenry of Montgomery County. The facility has no activities, social or otherwise, other than providing a swimming pool facility for the neighborhood where it is located. At the time of its creation, and even now, the County does not have the financial or administrative resources to provide swimming pools at all appropriate geographic locations within the County. Recognizing this unfortunate state, an alternative means, under governmental auspices, was developed; the community pool. This alternative allowed neighborhood groups to help themselves and the County in discharging a function and performing a service which is to benefit the public. To this end, the Respondent sought County consent, publicly solicited funds, publicly solicited members and held public meetings (Appendix B, Panel Finding No. 7, Apx. 4a). The Respondent was created by community action, and for many years served the community. It was only after the racial composition of the community began to change that the Respondent sought to abrogate its duty as a public facility.

Primary importance must be given to the fact that all the indicia of privacy came into being well after

the swimming pool was constructed and fully operational. It was only with the advent of racial integration in the neighborhood that the swimming pool aspired to exclusivity. The Opinion and Findings of Fact of the County's Human Relations Panel on Public Accommodations establish beyond any doubt that the swimming pool facility was conceived in "openness" and has embraced "privacy" only recently. The totality of Wheaton-Haven's operations leads to only one conclusion:

Its existence is transparently meretricious and paper thin. To hold that it was an exempt club would make a mockery of the club exemption, would pervert the congressional purpose and would legitimize a mere stratagem. *United States v. Richberg, supra* at 529.

#### CONCLUSION

For the foregoing reasons, Wheaton-Haven should not be entitled to an exemption as a private club under Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a) and, therefore, the judgment below should be reversed.

Respectfully submitted,

**RICHARD S. McKERNON**

*Acting County Attorney for  
Montgomery County, Maryland*

**ALFRED H. CARTER**

*Deputy County Attorney*

**WILLIAM J. CHEN, JR.**

*Assistant County Attorney  
County Office Building  
Rockville, Maryland 20850  
279-1346*

June 1972

## APPENDIX A

MONTGOMERY COUNTY COMMISSION ON HUMAN RELATIONS  
PANEL ON PUBLIC ACCOMMODATIONS

CASE No. P. A. 6

MR. AND MRS. MURRAY TILLMAN AND DR. AND  
MRS. HARRY CODY PRESS, *Complainants*

v.

WHEATON-HAVEN RECREATION ASSOCIATION,  
INC., *Respondents*Opinion, Including Findings of Fact, Conclusion of Law,  
Panel Decree and Final Order

On September 17, 1968, Mr. and Mrs. Murray Tillman instituted a complaint against the respondent, Wheaton-Haven Recreation Association, Inc., alleging violation of the County Public Accommodations Ordinance, Chap. 77, Sec. 77-9 and 10, Laws of Montgomery County (1968) (hereinafter referred to as the "Ordinance").

The basis of the complaint alleges that on July 24, 1968, Mrs. Grace Rosner, a Negro, was refused admittance to respondent's pool as a guest of the Tillmans, bona fide members of respondent. This refusal to admit Mrs. Rosner was allegedly based upon her lack of family relationship to a member despite the fact that she was admitted as a guest on July 19, 1968 and the family relationship criteria was not applied to Caucasian guests. The complaint also made reference to a long-standing policy of systematic racial discrimination and deprivation to some of respondent's members of their basic legal rights. These allegations were supported by accompanying affidavits, executed by several members of respondent.

On November 13, 1968, Dr. and Mrs. Harry Cody Press also instituted a complaint against the respondent, similarly alleging a violation of the Ordinance. The Press complaint

was based upon allegations that they were deprived of a membership application and subsequent admission to membership in May, 1968, solely on the ground that they are Negroes.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the Executive Secretary of the County Human Relations Commission, Bertram L. Keys, Jr., conducted an investigation of the facts and made a finding of probable cause to credit the allegations contained in the complaints. Mr. Keys also attempted unsuccessfully to conciliate the matter pursuant to the foregoing section of the Ordinance and has notified respondent that his office is still available for this purpose up to and including the present date.

The Commission's Panel on Public Accommodations ordered the complaints consolidated for a determination of the common issue involved and conducted a public hearing at 8:00 o'clock P.M., April 24, 1969, in the first floor auditorium of the County Office Building, 108 South Perry Street, Rockville, Maryland. The hearing was conducted pursuant to Sec. 77-5(3)(b) of the Ordinance.

The panel consisted of Gerald D. Morgan, Chairman and Presiding Officer, Dr. Thomas A. Cook, Jr., and Lawrence D. Burke, Commissioner. The case in support of the complaints was presented by Philip J. Tierney, Esq., Assistant County Attorney. Also participating were Stanley D. Abrams, Esq., Assistant County Attorney, and Samuel A. Chaitovitz, Esq., of the American Civil Liberties Union, representing Mr. and Mrs. Tillman.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the respondent was summoned to appear through four (4) representatives alleged in the complaint to have fostered the violation of the Ordinance. The four, Philip Trusso, Bernard Katz, Anthony J. DeSimone, and Brian Carroll, avoided the summons and did not appear. Counsel for respondent, William N. Dunphy, Esq., appeared and ad-

vised the Panel that his client did not choose to be present and challenged *inter alia* the jurisdiction of the Panel to conduct the hearing as respondent was alleged to be distinctly private in nature. Mr. Dunphy advised the Panel of equitable relief sought on behalf of respondent in the Circuit Court for Montgomery County and requested the hearing be suspended pending the outcome of his litigation. The Panel overruled respondent's motion. Mr. Dunphy then left and the Panel proceeded with the hearing.

As a result of all the evidence received at the public hearing, the Panel members make the following findings of fact, conclusion of law, decision, and final order.

#### FINDINGS OF FACT

1. The complainants, Mr. and Mrs. Murray Tillman, are taxpaying residents of the County and have been bona fide members of respondent since 1961.

2. The complainants, Dr. and Mrs. Press, have been taxpaying residents of the County since 1965. The Presses are Negroes. They live within the prescribed geographical boundaries, as contained in respondent's By-Laws, that would make them available for membership in respondent.

3. Respondent, Wheaton-Haven Recreation Association, Inc., is a non-profit Maryland corporation organized on May 23, 1958 for the purpose of operating a swimming pool for the recreation of the prescribed community. The respondent's business address is 10910 Horde Street, Silver Spring, Maryland, 20902.

4. Respondent pool was constructed in 1958-1959 subsequent to a special exception granted September 23, 1958 by the Montgomery County Board of Appeals, pursuant to Zoning Ordinance as recited in Sec. 107-28(Z-4), Montgomery County Code (1955).

5. The foregoing zoning provision was enacted by the Montgomery County Council by Ordinance No. 3-28,



dated May 24, 1955. The Council stated therein that "... this action sets up the community swimming pools as a special exception. . . . The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

6. On August 13 and August 23, 1958, the Board of Appeals conducted public hearings on Case No. 656, respondent application for the special exception. The record of these proceedings indicates that respondent's witnesses testified that the County was unsuccessfully approached to construct a pool, that in lieu of County action respondent initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

7. Prior to the grant of the special exception, the Board required respondent to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed. During early 1958, respondent conducted an intensive membership drive. A circular was published and distributed to surrounding neighborhoods and communities that requested an immediate and unqualified call for membership. Apparently no Negroes lived within the geographic area of the pool at the time. Door-to-door solicitations were conducted by respondent members to obtain membership and a minimum Twenty Dollar (\$20.00) pledge. No qualifications were placed upon the respondent solicitors regarding membership criteria. On July 9, 1958 an open meeting was conducted by respondent's promoters on public grounds, the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, to further solicit and promote membership. These efforts resulted in meeting the zoning requisites.

8. During hearing before the U. S. Senate Finance Committee regarding H. R. 7125 (later to become P. L. 85.859—Excise Tax Exemption) conducted on July 15, 16, and 17, 1958, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified that the community pool was an instrument utilized to serve an imperative recreational need in Montgomery County owing to the failure of government to construct public pools due to lack of adequate resources. The pools were held to provide a healthy and constructive outlet for youth and general benefit to the public at large. The pools provide recreation to lower middle income groups that would otherwise be unavailable. The community pool was held distinguished from private country clubs and their attendant social program.

9. On June 12, 1962, the County Council adopted the Ordinance, Sec. 2 of which specifically provided that the definition of a public accommodation shall include swimming pools. At the time the Ordinance was enacted, there were no public, government-operated, swimming pools in existence within Montgomery County. There were, however, forty-three (43) community pools in operation in the County, including respondent.

10. Respondent is exempt from and does not pay federal or state income taxes under the provision of the U. S. Internal Revenue Code, Chapter 501, Sec. C(7) and the Maryland Code, Art. 81, Sec. 88(g)(8). Respondent also obtained an exemption from U. S. Excise Taxes during the years 1958 through 1964. All this tax relief was granted respondent because of its function as a community swimming facility.

11. Respondent operates exclusively as a community swimming facility conducting no social functions and its membership is solicited solely for that recreational purpose.

12. Before 1964 respondent did not conduct personal interviews with applicants. Recently respondent has insti-

tuted a policy of conducting personal interviews with applicants, but no social, formal or business background data is obtained from these interviews. The sole purpose of the interview is apparently to observe the physical appearance of the applicant.

13. Membership in respondent is not personal to the individual but runs to family units.

14. Respondent's By-Laws, adopted July 31, 1958, contain no racial covenants or restrictions on membership which is limited only to a prescribed geographic area and thirty (30) percent of the total membership may be excluded from that limitation.

15. By 1967 the neighborhood within the prescribed geographic area was a well-integrated community.

16. No Caucasian applicant has ever been rejected for membership in respondent.

17. Respondent, until May, 1968, posted the telephone number of the membership chairman on a large sign located in a conspicuous position at the pool, thus serving as an open invitation for membership. It was common knowledge in the community that respondent membership was open.

18. Until the summer of 1964, no racial discrimination policy was overtly manifested by respondent. That summer respondent refused to permit integrated swimming teams to utilize respondent facility. Some of respondent's members protested this policy and sought to change it. However, on November 11, 1964, at the annual open membership meeting of respondent, a proposal to change the swim team racial policy was rejected.

19. Subsequently, respondent refused to admit into the pool Negro babysitters who cared for children of members, while Caucasian babysitters of members were admitted.

20. On July 19, 1968, Mrs. Grace Rosner, a Negro, accompanied the Tillmans as their guest to respondent pool

and was admitted to the pool despite an altercation with Anthony J. DeSimone, who attempted to prohibit the admission of Mrs. Rosner. On July 24, 1968, Mrs. Rosner returned to the pool with the Tillmans, but was denied admission because of a newly promulgated rule that limited guests only to relatives of respondent members. This rule was not in existence prior to July 20, 1968. The rule was not enforced toward Caucasian guests. The respondent, through its gate attendants and officers, instructed members to lie about the relationship of their Caucasian guests, thereby avoiding the application of the rule.

21. In April, 1968, respondent, upon a good faith inquiry, failed to send a membership application to Dr. and Mrs. Press. The Presses have been and presently are willing to join respondent and are able to assume the financial responsibilities of membership. The Presses intended to use respondent pool as a convenient recreational facility that is available to their Caucasian neighbors and the Caucasian playmates of their children. In May, 1968, respondent officials expressly refused to consider the Presses for membership solely because of their race.

22. Brian Carroll, Anthony J. DeSimone, Bernard Katz, and Philip Trusso, officials of respondent, published and promoted on several occasions to witnesses appearing before the Panel that respondent pool was segregated and had a policy to continue such segregation.

23. On November 12, 1968, at a general membership meeting, the membership of respondent, by a vote of 81-25, endorsed the discriminatory policies practiced to that date.

#### CONCLUSIONS OF LAW

The core issue deals with whether the composition of people gathered at a swimming pool open to the neighborhood must include Negro friends and neighbors. If the complainants possess legally protected rights which respondent has abused, the respondent's conduct must

be circumscribed to comply with these rights. The respondent planned and built a swimming pool with its own funds to provide recreation for a prescribed community in Wheaton. Respondent contends the pool is private, that complainants have no rights concerning the pool, and it is free to pick and choose those who can swim. The view we take renders these contentions sophistic.

## I

A party claiming exemption from the Ordinance as an organization distinctly private in nature has the burden of demonstrating this assertion. Respondent's failure to appear and present evidence of a private nature does not help its case, but the purposes of our analysis we have attempted to view the facts in a light most favorable to respondent. The exemption to the Ordinance was designed to cover private organizations created to protect the personal associational preference of its members. However, a naked claim that an organization is private in nature will not stand if an examination reveals the organization lacks the characteristics usually attributed to such a private organization. We shall first examine respondent's qualification for this exemption.

The pool was built and operated solely as a community recreational facility and possesses none of the accoutrements of a private club, that is, rank, society, and selectivity. The pool has been accessible to the entire neighborhood Caucasian population without qualification. In fact, respondent's By-Laws allow thirty (30) percent of the membership to come from the *public at large*. The only concrete membership standard that has surfaced during respondent's existence is the ability to pay. The pool operates no social programs and the membership itself runs to the family unit rather than the individual. That respondent exercises no policy of genuine selectivity is manifested by the open invitation to neighborhood Caucasians with no evidence any of these applicants were ever rejected.



The recent employment of the interview device and a relatives-only guest rule supposedly throws a blanket of selectivity over respondent. However, the facts indicate these methods were merely a subterfuge, the objective of which was to test the color of the applicants' skin and exclude Negroes. Neither device has been applied consistently to Caucasians nor has respondent ever pursued a policy of exclusiveness toward Caucasians. By application of these afterthoughts, respondent attempts to take on a new appearance; we find he cannot use such methods to make a private club out of an organization with an alien nature.

But perhaps the most conclusive evidence of respondent's true nature can be found in the testimony submitted on its behalf before the zoning authority. That testimony gave no hint of a private nature or an interest by respondent in being so classified. Respondent's very existence and purpose was heralded as a public benefit—juvenile delinquency would be curtailed, restless youths would be given a playground, and an imperative community recreational need would be satisfied. To now contend that respondent is distinctly private in nature after the benefits of a favored status accorded by the government have been enjoyed since 1958 would cast considerable doubt on respondent's good faith and credibility. We therefore hold respondent has never been distinctly private in nature.

The factor which absolutely convinces us that respondent is a public accommodation is a reading of the Ordinance which expressly covers swimming pools. When the Ordinance was enacted by the County Council in 1962, forty-three community pools were in operation, including respondent. There were no government-operated pools in existence and community pools were the closest to the definition, "public." It would appear that the Council intended such swimming pools to be classified as a public accommodation since such was the holding by the Maryland Court of Appeals before enactment of the Ordinance.

*Drews v. State*, 224 Md. 186, 167 A.2d 341 (1960). If the Council intended to limit the definition of swimming pools to exclude the community pools, an exception could have easily been written into the Ordinance as was the case with taverns. Furthermore, the list of public accommodations could have excluded recreational areas as was the case with the State law. *Maryland Code*, Art. 49B, § 11, *et seq.* Therefore, it is only reasonable to infer from the ordinary meaning of the words used that the Ordinance was intended to cover community swimming pools, the only swimming pools in existence at the time. We hold that respondent is a public accommodation within the meaning of the Ordinance.

## II.

Beyond the technical application of the Ordinance, serious questions concerning the substantive application of the Ordinance have been raised by respondent's particular conduct toward the complainants. The nature of respondent's operation, its government subsidies, open solicitation of Caucasian membership, and the public benefit aspects of its construction and operation give rise to a classification of respondent as a public function under the doctrine of *Evans v. Newton*, 382 U.S. 296 (1966). Therefore, respondent would be subject to the same limitation as the State.

The sale of real estate within the prescribed area contained in respondent's By-Laws is enhanced because of the proximity, accessibility, and advantages incident to a community swimming pool. This factor will allow Caucasians to sell to Caucasians at a premium. Negroes must pay the premium without receiving the corresponding benefits or forego purchase of a house in the prescribed area. The result of this policy deprives the Negro of basic legal rights.

Some pool members are forced, through the inconsistent application of the relatives-only guest policy to limit their

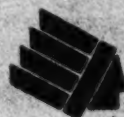
social experiences or forego use of the pool. The result of such an arbitrary standard is to circumscribe and discourage the free associational conduct of these members and also deprives them of basic legal rights.

The full thrust of respondent's policy would tend to discourage Negroes from moving into the prescribed area. In effect, respondent, through its policy of systematic discrimination, has created a racial zoning ordinance without County sanction. These are areas that the public accommodations ordinance is certainly intended to protect and respondent, as public function, may not operate to derogate this intent. It is therefore unlawful for any place of public accommodation in the County to practice racial discrimination in granting membership or admitting guests when guests are so provided by the organization's own regulations. However, in the instant case, it has been demonstrated that respondent received and continues to receive special treatment by the government in the form of tax exemptions, liberal zoning laws, and various other consideration during the initial building stage. These factors tend to impose an even higher standard of duty upon respondent to refrain from practicing racial discrimination.

### III.

The several incidents of alleged racial discrimination are well supported and uncontroverted. A Negro was excluded from the pool as a guest of a bona fide member on the basis of lack of relationship to member. However, Caucasians were admitted with the same lack of membership and told to lie about it. It is clear the family relationship rule and its application was a mere contrivance to exclude Negroes from an otherwise open facility. Such practices are unlawful.

A Negro family applied for pool membership while filling all of the apparent requisites set for Caucasian applicants. Their unexplained exclusion was clearly discriminatory and unlawful.



**Microcard Editions**

An Indian Head Company

A Division of Information Handling Services

**CARD 6**



Several respondent officials published and promoted the racial discrimination policy stated above, also in violation of the Ordinance. It is clear from a total view of respondent's conduct over the years that it has practiced an unlawful and systematic policy of racial discrimination. The respondent was clearly an open facility regarding Caucasian guests and residents. The only restrictions were applied toward the Negro guest and resident.

#### PANEL'S DECISION

And now, May 29, 1969, upon consideration of all the evidence submitted at the public hearing of this case, the finding of fact, and the conclusion of law, the Montgomery County Human Relations Commission Public Accommodation Panel unanimously finds and determines:

1. The Panel has jurisdiction over respondent, over the subject matter of this proceeding, and over the instant complaint.
2. The respondent, Wheaton-Haven Recreation Association, Inc., is a public accommodation as that term is defined in the Ordinance, Sec. 77-9.
3. The respondent has refused, withheld from, and denied to the complainants, solely because of race, the accommodations and advantages of the respondent's community swimming pool, either as members or guests, and consequently respondent has committed and continues unlawful discriminatory practice in violation of the Ordinance, Sec. 77-10.
4. Respondent, operating as a public function and under the Ordinance, cannot promote policies of racial discrimination excluding Negroes to the extent its facilities are available and open to Caucasians.



**FINAL ORDER**

And now, May 29, 1969, upon consideration of the foregoing, and pursuant to Sec. 77-5 of the Ordinance, it is hereby ORDERED:

1. That the respondent, Wheaton-Haven Recreation Association, Inc., its agents, employees and members, shall cease and desist from directly or indirectly refusing, withholding from, or denying to complainants and other persons, because of their race, color, religion, creed, ancestry or national origin, the accommodations and advantages of membership and guest privileges in the respondent community swimming pool facility or the use and enjoyment thereof.

2. That the respondent, Wheaton-Haven Recreation Association, Inc., shall take the following affirmative action which in the judgment of the Panel will effectuate the purposes of the Ordinance.

a. Instruct all its members, officers, managers, and employees, in writing, to comply with the requirements of Paragraph 1 of this Final Order. Copies of such written instruction, signed by all of respondent's officers, managers, and employees, acknowledging receipt and understanding thereof shall be transmitted to the Panel within fifteen (15) days after service of this Final Order.

b. Notify all members of respondent, in writing, that henceforth the policy and practice of respondent will be to serve any guest of a member regardless of his race, religion or national origin and that new members will be considered without regard to race, religion or national origin. A copy of such written communication shall likewise be transmitted to the Panel.

3. Failure to comply with this Order within the specified time will subject the respondent and its officers, jointly and severally, to the liabilities imposed by the Ordinance. This in no way limits the Panel or the Human Relations

Commission from pursuing any of the rights and remedies provided by law.

By ORDER OF

THE MONTGOMERY COUNTY, MARYLAND,  
HUMAN RELATIONS COMMISSION PANEL  
ON PUBLIC ACCOMMODATIONS

GERALD D. MORGAN, *Chairman*  
DR. THOMAS A. COOK, JR.  
LAWRENCE D. BURKE

## APPENDIX B

Case No. 656

PETITION OF WHEATON-HAVEN RECREATION  
ASSOCIATION, INC.

(Hearing held August 13, 1958 and August 23, 1958;  
case decided September 20, 1958)

## Opinion of the Board

This is a petition for a special exception under Section 107-28a-4 of the Zoning Ordinance (Chap. 107, Mont. Co. Code 1955, as amended) to permit the construction and use of a community swimming pool on 4.174 acres, being a part of a tract known as "John Fitzgerald", on the west side of Horde Street, Silver Spring, Maryland, in an R-60 zone.

The petitioner proposes to limit its membership to 325 families. The pool will operate approximately from June 1 to September 1, and will be open during weekdays no earlier than 9 a.m. and no later than 9 p.m. On Sundays, it will open no earlier than 1 p.m. and close no later than 9 p.m.

Exhibit No. 30 is a letter stating that the petitioner agrees to regulate its activities in a specific manner described therein so as not to disturb the members of a nearby Church.

Several residents in the area of the proposed pool appeared at the public hearing in opposition to the petition. Their objections were based primarily on traffic conditions resulting from use of the proposed pool. Considerable evidence was introduced on this point. In connection with this, as well as the objections based on noise, property values and the like, the County Council has provided that with respect to community swimming pools, the following standards, applicable to all other types of special exceptions, shall not govern the decision of the Board:

"(1) The proposed use does not affect adversely the General Plan for the physical development of the

District, as embodied in this Ordinance and in any Master Plan or portion thereof adopted by the Commission; and

"(2) The proposed use will not affect adversely the health and safety of residents or workers in the area and will not be detrimental to the use or development of adjacent properties or the general neighborhood;" (See Section 107-26a(1) & (2)).

The standard which, instead of the above, is applicable in all community swimming pool cases is that "such use will not affect adversely the present character or future development of the surrounding residential community." (See Section 107-28z-4).

The evidence introduced at the public hearing is more than sufficient to sustain a favorable finding with regard to the applicable standard stated above. The record shows that the residential character and future development of the community surrounding the pool will not be adversely affected. The access roadways to and from the proposed pool are not ideal for the purpose involved, but the evidence shows that this is not so severely detrimental as to preclude us from finding that there will be no adverse affect on the present character or future development of the surrounding residential community. (Compare *Petition of Chevy Chase Recreation Association, Inc.*, Case No. 602). We believe, after examining all the evidence before us, that the petitioner has sustained the burden of proof with respect to applicable requirements of Section 107-28z-4. We find, therefore, that they have been met.

The special except for the proposed use, in the manner proposed in the exhibits and testimony, is *granted*.

The Board adopted the following Resolution:

"Be it Resolved by the County Board of Appeals for Montgomery County, Maryland, that the opinion stated above be adopted as the Resolution required by law, as its decision on the above-entitled petition."

The foregoing Resolution was proposed by Mr. Henry J. Bison, Jr., Vice Chairman, and concurred in by Mr. William A. Quinlan, Chairman, constituting all the members of the Board.

EDWERTA B. BARKER

ATN

*Clerk to the Board*

I do hereby certify that the foregoing Minutes were officially entered upon the Minute Book of the County Board of Appeals this 23rd day of September, 1958.

EDWERTA B. BARKER

ATN

*Clerk*



## APPENDIX C

Enacted November 4, 1969  
Effective November 4, 1969

COUNTY COUNCIL  
FOR MONTGOMERY COUNTY, MARYLAND  
SEPTEMBER LEGISLATIVE SESSION 1969

## CHAPTER 33

## BILL No. 46-69

AN ACT to add two new articles to the Montgomery County Code 1965, to be known as Article I, title "Commission on Human Relations," and Article II, title "Discrimination in Places of Public Accommodation," Chapter 77, to directly precede Chapter 77, Section 77-13 as enacted by Chapter 19 of the Laws of Montgomery County 1968; to create a Commission on Human Relations who shall research, study, advise and investigate matters relating to any practice of discrimination, prejudice, intolerance or bigotry that may exist on account of race, color, religious creed, ancestry or national origin; shall exercise educational programs and use persuasion in the elimination of such practice; to initiate or receive complaints of discrimination, prejudice, intolerance and bigotry which deprives persons of equal rights, protection or opportunity; to seek conciliation of such complaints and make recommendations, procedures, programs or legislation to eliminate discrimination; to proceed with other programs to relieve group tension from causes not related to race, color, religious creed, ancestry or national origin; to create a Commission Panel on Public Accommodations in accordance with administrative and constitutional due process to prohibit discriminatory practices against any person on account of race, color, religious creed, ancestry or national origin in every place of public accommodation, resort or amusement of any kind,

in Montgomery County, Maryland, whose facilities, accommodations, services, commodities or use are offered or enjoyed by the general public, either with or without charge, but shall not include any accommodations which are in their nature distinctly private, and to assure nondiscrimination to all persons, coexistent with the intent and purposes but not necessarily the scope or limitation of the Public Accommodations Provision of the United States Civil Rights Act of 1964; to assure enforcement of the provisions of this enactment within its terms; and to have the County Executive, with the approval of the County Council, appoint members to the Commission on Human Relations, Commission Panel on Public Accommodations and Commission Panel on Housing.

*Be It Enacted by the County Council for Montgomery County, Maryland, that—*

Sec. 1. There are hereby added two new articles to the Montgomery County Code 1965, to be known as Article I, title "Commission on Human Relations," and Article II, title "Discrimination in Places of Public Accommodation," Chapter 77, to directly precede Chapter 77, Section 77-13 as enacted by Chapter 19 of the Laws of Montgomery County 1968, to read as follows:

#### Article I. Commission on Human Relations

##### Sec. 77-1. Statement of Policy.

It is hereby declared to be the public policy to eliminate discrimination, prejudice, intolerance or bigotry of any forms that may exist on account of race, color, religious creed, ancestry or national origin.

It is further declared to be the public policy of the county that discrimination in housing and places of public accommodation against any person on account of race, color, religious creed, ancestry or national origin is contrary to

the morals, ethics and purposes of a free, democratic society; is injurious to and threatens the peace and good government of this county; is injurious to and threatens the health, safety and welfare of persons within this county; and is illegal and should be abolished.

Sec. 77-2. Created; membership, appointments and term of office of members; Commission Panels.

There is hereby established a Commission on Human Relations. The Commission shall consist of not less than nine (9) members and not more than fifteen (15) members to be appointed and may be removed for cause by the County Executive with the approval of the County Council and who shall be broadly representative of the racial, religious, and ethnic groups of the County. The terms of the members of the Commission shall be for one, two, or three years, as prescribed by the County Executive at the time of appointment, so as to provide for the vacating of the terms of one-third of the members of the Commission annually. Each member of the Commission shall continue to serve after his term until his successor has been appointed and has qualified. The County Executive, with the approval of the County Council, shall appoint a Commission Panel on Public Accommodations, a Commission Panel on Housing, and any further panel as determined by law.

Sec. 77-3. Officers; meetings; quorum; voting.

The County Executive may designate a member of the Commission on Human Relations to be Chairman and, in the absence of any member being designated, the Commission may elect a Chairman notwithstanding their authority to elect such other officers as it may deem necessary. The Commission shall hold meetings at regular intervals but not less frequently than once every month. A majority of the members of the Commission shall constitute a quorum for the transaction of business, and a majority vote of those

present at any meeting shall be sufficient for any official action taken by the Commission.

**Sec. 77-4. Executive Secretary; additional personnel; budget preparation.**

A member of the County Executive's staff or his acting designee shall serve as executive secretary of the Commission on Human Relations and shall assist the Commission Panels as determined by law. Other personnel and facilities may be authorized by the County Executive to assist the Commission in carrying out the provisions of this Chapter. The Commission may, with the approval of the County Executive engage the services of volunteer workers and consultants without salary, who may be reimbursed their out-of-pocket expenses incurred in the course of performing such services. Services of an individual as a volunteer worker or consultant pursuant to this Chapter shall not be considered as service of employment bringing such individual within any Merit System of the County or State of Maryland. In proposing a budget for the operation of the Commission and in selecting other personnel and facilities the County Executive shall take into consideration the recommendations of the Commission.

**Sec. 77-5. Compensation and expenses of members.**

The members of the Commission on Human Relations shall serve without compensation, but they may be reimbursed for all expenses necessarily incurred in the performance of their duties in accordance with appropriations made by the County Council.

**Sec. 77-6. Duties generally.**

(1) The Commission on Human Relations shall have the power and it shall be its duty:

(a) To research, assemble, analyze, and disseminate pertinent data and educational materials relating to activities

and programs which will assist in the elimination of prejudice, intolerance, bigotry, and discrimination, and to institute and conduct educational and other programs, meetings, and conferences to promote equal rights and opportunities of all persons regardless of their race, religious creed, ancestry or national origin and to promote good will, cooperation, understanding, and human relations among all persons of different races, colors, religious creeds, ancestries or national origins. In performance of its duties, the Commission shall cooperate with interested citizens, racial, religious and ethnic groups, community, business, professional, technical, educational and civic organizations.

(b) To cooperate with the County Executive; and all governmental agencies concerned with matters within their jurisdiction.

(c) To study and investigate by means of public or private meetings, conferences and public hearings conditions which may result in discrimination, prejudice, intolerance and bigotry because of race, color, religious creed, ancestry or national origin.

(d) To advise and counsel the residents of Montgomery County, the County Council, the County Executive and the various departments of County, State and Federal governments on matters involving racial, religious, or ethnic prejudice, intolerance, discrimination and bigotry and to recommend such procedures, program or legislation as it may deem necessary and proper to promote and insure equal rights and opportunities for all persons, regardless of their race, color, religious creed, ancestry or national origin.

(e) To work to remove inequalities due to discrimination, prejudice, intolerance and bigotry on such problems as housing, recreation, education, health, employment, public accommodations, justice and related matters.

(f) To initiate or receive complaints of discrimination, prejudice, intolerance and bigotry from any person or group



because of race, color, religious creed, ancestry or national origin which deprives that person or group of equal rights, protection or opportunities. To investigate complaints, seek conciliation of such complaints, and if warranted, to hold hearings and make recommendations on such complaints. Neither the Commission as a whole, nor any of its members not serving on a panel, shall engage in any of the functions or jurisdictions assigned to a Commission Panel or the Executive Secretary.

(g) To adopt such rules and procedures as may be necessary to carry out the purposes and provisions of this Chapter; to keep a record of its hearings, activities, and minutes of all meetings, said records and minutes shall be on file with the Executive Secretary of the Commission and open to the public at reasonable business hours upon request.

(h) To render at the request of the Executive or within thirty (30) days following each quarter of the calendar year preliminary written or oral reports of its activities and recommendations to the County Executive and the County Council and a final written yearly report summarizing its activities, goals, needs, and recommendations.

(i) Despite the foregoing provisions of this law, the Commission is authorized to proceed with other programs which will seek to relieve group tension and/or adverse intergroup activities which may result from causes not related to race, color, religious creed, ancestry or national origin provided that such action is first submitted to the County Executive and further provided that the County Executive does not disapprove such action.

#### Sec. 77-8. Committees, Advisory Committees.

The Chairman of the Commission on Human Relations may, with the approval of the Commission, appoint com-

mittees from its members to assist in carrying out any of the functions and duties of the Commission. Any committee appointed shall consist of not less than three members.

The Chairman of the Commission may appoint advisory committees of citizens and at least one Commission member as in his judgment will aid in effectuating the purposes of this Article. Advisory committee action shall not be deemed to be the actions of the Commission and shall in no way bind the Commission or its members.

## Article II. Discrimination in Places of Public Accommodation.

### Sec. 77-9. Applicabilty of article.

This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall apply and be applicable to every place of public accommodation, resort or amusement of any kind in the county whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public, either with or without charge, and shall include, but not be limited to, the following types of places, among others: All restaurants, soda fountains and other eating or drinking places and all places where food is sold for consumption either on or off the premises; all inns, hotels, and motels, whether serving temporary or permanent patrons; all retail stores and service establishments; all hospitals and clinics; all motion picture, stage and other theaters and music, concert or meeting halls; all circuses, exhibitions, skating rinks, sports arenas and fields, amusement or recreation parks, picnic grounds, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool rooms and swimming pools; all places of public assembly and entertainment of very kind; but shall not include any accommodations which are in their nature distinctly private.

**Sec. 77-10. Prohibited acts.**

It shall be unlawful for any owner, lessee, operator, manager, agent or employee of any place of public accommodation, resort or amusement within the county:

(a) To make any distinction with respect to any person based on race, color, religious creed, ancestry or national origin in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

(b) To display, circulate or publicize or cause to be displayed, circulated or publicized, directly or indirectly, any notice, communication or advertisement which states or implies that any facility, service, commodity or activity in such place of public accommodation, resort or amusement will not be made available to any person in full conformity with the requirements of subsection (a) of this section or that the patronage or presence of any person is unwelcome, objectionable, unacceptable or not desired or solicited on account of any person's race, color, religious creed, ancestry or national origin.

**Sec. 77-11. Commission Panel on Public Accommodations; Authority Enforcement procedures.**

(a) The Commission's Panel on Public Accommodations shall be selected and have the functions enumerated in Section 77-13(d), Chapter 19 of the Laws of Montgomery County 1968.

(b) The Commission Panel on Public Accommodations shall have the authority and power enumerated in Section 77-16, Chapter 19 of the Laws of Montgomery County 1968, except that Section 77-16(a) thereof insofar as it applies to Sec. 77-11(b) herein shall be concerned with public accommodations in lieu of housing and real property matters.

(c) The Commission Panel on Public Accommodations shall have the procedures for enforcement as enumerated in Section 77-17, Chapter 19 of the Laws of Montgomery County 1968.

**Sec. 77-12. Penalty for violation of article; injunctions.**

Any person who violates any of the provisions of this Article relating to discrimination practices, or any rule or regulation pertaining thereto, shall be subject to injunctive or other appropriate action or proceeding to correct any violation of this Article, and any Court of competent jurisdiction may issue restraining orders, temporary or permanent injunctions or other appropriate forms of relief.

**Sec. 2.** Notwithstanding Section 77-2 and on the effective date hereof, the appointment and terms for members of the Commission on Human Relations, Commission Panel on Public Accommodations and Commission Panel on Housing shall be those members and such remaining terms thereof that existed on September 11th, 1969.

**Sec. 3.** The provisions of these Articles are severable and if any provision, section or part thereof is held invalid it shall not affect or impair any of the remaining provisions.

**Sec. 4.** The County Council declares an emergency exists as to the need of the enactment of Article I and II of Chapter 77, and the above shall become effective immediately upon adoption.

**Sec. 5.** Prior to December 7, 1970, the word "County Executive" shall mean the County Council except in Section 77-4 where it shall mean County Manager.

Certified correct as passed.

---

President

---

Secretary

DLC:b





## Index

	Page
Lower Court Opinions .....	1
Jurisdiction .....	1
Interest of Amicus Curiae .....	2
Amicus Curiae Authority .....	3
Question Presented .....	3
Statute Involved .....	3
Statement .....	5
Summary of Argument .....	10
Argument:	
A community swimming pool, open to white families residing in the surrounding community, is not entitled to an exemption from federal civil rights laws as a private club .....	10
Conclusion .....	22

## CITATIONS

Cases:

<i>Bell v. Kenwood Golf and Country Club, Inc.</i> , 312 F. Supp. 753 (D. Md. 1970) .....	14, 16, 17
<i>Castle Hill Beach Club v. Arbury, N.Y.</i> , 2 N.Y. 2d 596, 162 N.Y.S. 2d 1, 142 N.E. 186 (1957) .....	20
<i>Clover Hill Swimming Club v. Goldsboro</i> , 47 N.J. 25, 219 A. 2d 161 (1966) .....	17, 20
<i>Doniel v. Paul</i> , 395 U.S. 298 (1969) .....	14, 19
<i>In re Holiday Sands, Inc.</i> , 9 Race Rel. L. Rep. 2025 (1964) .....	17
<i>Moore Lodge No. 107 v. Irvis</i> , 40 U.S.L.W. 4715 (U.S. June 12, 1972) .....	18, 20
<i>Nasmith v. YMCA</i> , 397 F. 2d 96 (4th Cir. 1968) .....	12, 16
<i>Stout v. YMCA</i> , 404 F. 2d 687 (5th Cir. 1968) .....	16
<i>Sullivan v. Little Hunting Park</i> , 396 U.S. 229 (1969) .....	12, 14, 15, 17, 19, 20
<i>Timmon v. Wheaton-Haven Recreation Association, Inc.</i> , 451 F. 2d 211 (4th Cir. 1971) .....	1, 13, 15, 19

	Page
<i>United States v. Clarksdale King &amp; Anderson Co.</i> , 288 F. Supp. 792 (N.D. Miss. 1965) .....	15
<i>United States v. Jordan</i> , 302 F. Supp. 370 (E.D. La. 1969) .....	14, 16
<i>United States v. Richberg</i> , 398 F. 2d 523 (5th Cir. 1968) .....	12, 14, 17, 18
<i>Williams v. Rescue Fire Company</i> , 254 F. Supp. 556 (D. Md. 1966) .....	18

## STATUTES:

Civil Rights Act of 1866, 42 U.S.C. § 1981, 1982 (1970)	5
Civil Rights Act of 1964, 78 Stat. 243 (1964), 42 U.S.C. 2000a (1970) .....	2, 3, 4, 5, 10, 12
INT. REV. CODE OF 1954, § 501(c)(17) .....	9, 21
MD. ANN. CODE art. 49B, § 1 <i>et seq.</i> (1972 Repl. Vol.) ..	2, 11
MD. ANN. CODE art. 81, § 288(d)(8) (1969 Repl. Vol.) .....	9, 11, 21
MONTGOMERY COUNTY, MD., CODE § 77-1 <i>et seq.</i> (1965) ..	2, 21
MONTGOMERY COUNTY, MD., CODE § 107-28(Z)(4) (1965) .....	7, 11
MONTGOMERY COUNTY, MD., CODE § 111-37(n) (1965) ..	7, 21

## MISCELLANEOUS:

Comment, <i>Current Developments in State Action and Equal Protection of the Law</i> , 4 GONZAGA L. REV. 233 (1969) .....	18
Hearing on H.R. 7125 BEFORE THE FINANCE COMMITTEE, 85th Cong., 2d Sess. (July 15, 16, 17, 1958) .....	11
110 CONG. REC. 13697 (1964) .....	12
1 RACE REL. L. SURVEY 231 (1970) .....	6
S. REP. NO. 110, 88th Cong., 2nd Sess 6008 (1964) ....	14
<i>Tillman v. Wheaton-Haven Recreation Association, Inc.</i> , No. P.A.-6 (Montgomery County, Maryland, Commission on Human Relations, June 3, 1969) ..	6, 13
U.S. SUP. CT. R. 42(2) .....	3

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

---

No. 71-1136

---

MURRAY TILLMAN, ET AL., *Petitioners*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC.,  
ET AL., *Respondents*

---

**Amicus Curiae Brief in Support of Reversal**

---

**AMICUS CURIAE BRIEF**

---

**LOWER COURT OPINIONS**

The opinion of the U. S. Court of Appeals is reported as *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 451 F. 2d 1211 (4th Cir. 1971). The opinion of the District Court is unreported.

**JURISDICTION**

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the U.S. Court of Appeals was entered on October 27, 1971. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was duly filed, but was denied by the U.S. Court of Appeals on December 16, 1971. Review was granted by this Court, 40 U.S.L.W. 3537 (U.S. May 16, 1972).

## INTEREST OF AMICUS CURIAE STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS

The issue raised in these proceedings involves the nature of a Maryland community swimming pool under the application of the federal public accommodations law. The State of Maryland has enacted an identical public accommodations law which provides *inter alia*:

It is unlawful for an owner or operator of a place of public accommodations . . . because of the race . . . of any person, to refuse, withhold from, or deny to such person any of the accommodations, . . .

\* \* \* \*

For the purpose of this subtitle, a place of public accommodation means:

\* \* \* \*

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment;

\* \* \* \*

The provisions of this section shall not apply to a private club or other establishment not in fact open to the public . . . MD. ANN. CODE art. 49B, § 11 (1972 Repl. Vol.).

The agency authorized by law to enforce these provisions is the State of Maryland Commission on Human Relations and is represented by its general counsel in all judicial proceedings. MD. ANN. CODE art. 49B, § 2. (1972 Repl. Vol.).

Community swimming pools operate in Maryland in substantial numbers. Most voluntarily comply with the aforesaid provisions of state law and do not discriminate in either membership or guest policies on

the basis of race. There are, however, a very few which promote racially discriminatory membership or guest policies which are now under investigation by the State Commission. Affirmation of the lower court's decision would have an adverse impact upon cases presently before the State Commission as well as a consequential effect upon those pools presently maintaining compliance with the State public accommodations law they believe to cover their operations.

#### AMICUS CURIAE AUTHORITY

The State of Maryland Commission on Human Relations, a duly constituted agency of the State of Maryland, files a brief *amicus curiae* in these proceedings pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States. The Commission has obtained the consent of all parties to file a brief *amicus curiae*.

#### QUESTION PRESENTED

Whether a community swimming pool open to the surrounding white community and without any articulated membership standards is a private club and, hence, exempt from the public accommodations law (42 U.S.C. § 2000a) which prohibits racial discrimination.

#### STATUTE INVOLVED

The statutory provision involved is Title II of the Civil Rights Act of 1964, 78 Stat. 243 (1964), 42 U.S.C., Sec. 2000a (1970), which provides, *inter alia*:

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on



the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

\* \* \*

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

\* \* \*

Operations affecting commerce; criteria; "commerce" defined

(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or

there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

#### Support by State action

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by Officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

#### Private establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

#### STATEMENT

The Petitioners instituted suit in Federal District Court (Civil Action No. 21294), Maryland District, against Respondents for violation of the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) and Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a).

The Respondents are Wheaton-Haven Recreation Association, Inc., hereinafter "Wheaton-Haven", a Maryland corporation, and thirteen individuals who have been or are now officers and directors of Wheaton-Haven. The case was heard on cross motions for Summary Judgment, and Petitioners' Motion for Preliminary Injunction. On July 8, 1970, the District Court (Northrop, D. J.) rendered an opinion in favor of the Respondents, finding that Wheaton-Haven was operated as a private club and was therefore exempt from the purview of the aforementioned federal laws. The Court of Appeals (Haynsworth, Boreman, Butzner, J.J.) affirmed the judgment of the District Court with one judge dissenting. Rehearing was denied, with Judges Winter and Craven joining the dissent from the denial of the petition. The Petitioners then petitioned for and were granted a Writ of Certiorari to the Supreme Court of the United States.

The federal suit was instituted after the Montgomery County Commission on Human Relations, though its Panel on Public Accommodations declared Wheaton-Haven to be a public accommodation under County law and not entitled to an exemption as a private club. Enforcement of the Commission's cease and desist order is presently awaiting Maryland State court action.

Wheaton-Haven is a non-profit Maryland corporation created in 1958 for the purpose of operating a "community swimming pool" in an area of Silver Spring, Montgomery County, Maryland.<sup>1</sup> The Re-

<sup>1</sup> The facts are based on the findings below supplemented where indicated by the Findings of Fact of the Montgomery County Human Relations Commission as set forth in *Tillman, et al. v. Wheaton-Haven Recreation Association*, No. P.A.-6, June 3, 1969, I RACE REL. L. SURVEY 231 (1970), and Appendix.

spondent operates exclusively as a community swimming pool and conducts no social functions, (A. 5). The pool was constructed by a Virginia building contractor after a special exception was granted for construction of the facility by the Montgomery County Board of Appeals. The special exception was granted pursuant to a zoning ordinance classifying community pools as a special exception to the general zoning ordinance. MONTGOMERY COUNTY, MD., CODE § 107-28(Z)(4)(1965) (A. 3). The Council stated in support of the special exception ordinance, "Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefited by such development." MONTGOMERY COUNTY, MD., CODE § 111-37(n)(1965) (A. 4). On August 13 and August 23, 1958, the Board of Appeals conducted public hearings on Case No. 656, Respondent's application for a special exception. At the hearings, the Respondent's witnesses testified that the Respondent was attempting to serve the imperative recreational needs of the community which the County had been unable to fulfill. The Respondent asserted that the pool was needed as a deterrent to juvenile delinquency, that the pool would not be used for social functions, and that the construction of the pool would be to the benefit of the community at large (A. 4).

In order to meet the requirement that sixty (60) per cent of the projected construction costs were obliged or subscribed, Wheaton-Haven conducted an extensive door-to-door membership drive in the surrounding neighborhoods and communities which at that time were all white. Advertising was a part of the campaign in those communities (A. 4). Charter member-

ships were solicited in the form of twenty dollar (\$20.00) pledges, and no other qualifications for membership were required. Respondent also conducted a promotional meeting in the Civic Auditorium of the Maryland-National Capital Park and Planning Commission (A. 4). The requisite costs were met and the special exception was granted.

The pool presently charges a \$375 initiation fee and annual dues of \$50-\$60. Under the by-laws, membership is open to bona fide residents of the area within a three-quarter mile radius of the pool. Up to thirty per cent of the membership may come from the public at large outside this area. Applicants for membership must be approved by an affirmative vote of a majority of those present at a regular meeting of the membership, a regular meeting of the Board of Directors, or a special meeting called for that purpose.

Membership is not personal but is by family units (A. 6), and though it is limited in the by-laws to 325 families, membership has actually been held at approximately 260 families for several years. Before 1964, interviews with prospective applicants were not conducted, and the interview procedure which was then initiated was for the sole purpose of observing the race of the applicant (A. 5-6). No social or business information is gathered at the interview (A. 5-6). If a member sells his property, the purchaser has the first option to purchase the vacant membership in the pool. Though the community was integrated by 1967 (A. 6), no Negroes have ever been accepted to membership. Wheaton-Haven's records show that only one white family has been denied membership during Wheaton-Haven's entire history.



Ostensibly only members and their relatives are admitted to the pool, and members of the general public cannot gain admittance by payment of an entrance fee.

Wheaton-Haven pays state and local real estate taxes, but is exempt from state and federal income taxes under MD. ANN. CODE art 81, § 288(d)(8) (1969 Repl. Vol.) and INT. REV. CODE OF 1954, § 501(c)(17), both of which exempt non-profit, member-owned and controlled recreational facilities. In the summer of 1964, the Respondent refused to allow both integrated swimming teams and black babysitters to use the facilities (A. 6).

Dr. and Mrs. Harry Press, two of the Negro Plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of the pool and therefore had no interest in the pool to transfer. In the spring of 1968, however, Dr. Press requested an application for membership in the pool from members of the pool's Board of Directors. Wheaton-Haven refused to furnish him with such an application. The stipulated reason for not sending the Press family an application was that they are black.

Mr. and Mrs. Murray Tillman have been bona fide members of Wheaton-Haven since 1965. Around July 19, 1968, the Tillmans, who are white, brought Grace Rosner, a Negro woman, to the pool as a guest. On July 20, 1968, Wheaton-Haven promulgated a rule that limited guests to relatives of members. On July 24, 1968, and at all times since that date, Wheaton-Haven has refused to permit the Tillmans to bring Mrs. Rosner to the pool as a guest.

## SUMMARY OF ARGUMENT

Under Title II of the Civil Rights Act of 1964, 78 Stat. 243 (1964), 42 U.S.C. § 2000a (1970), Wheaton-Haven Recreation Association, Inc. is a public accommodation which cannot discriminate on the basis of race. Wheaton-Haven's non-private character is revealed by an examination of four areas of the pool's history and structure; the exclusivity of membership, the purpose of the organization, public solicitation and public service. The facility's claim of private club status is specious since in fact Wheaton-Haven is open to white families within a certain geographic area, the only genuine basis of selectivity being that of race. Wheaton-Haven serves no social civic or fraternal purpose other than providing a facility to whites interested in swimming. The promoters of the facility engaged in public solicitation when it was established in 1958 and continued to do so until 1968. Wheaton-Haven has represented to Montgomery County that it would be a public benefit to the community at large by satisfying the imperative recreational needs of the community in lieu of a county-built facility. The organization has therefore assumed a community obligation which it may not subvert by donning a cloak of privacy.

## ARGUMENT

**A COMMUNITY SWIMMING POOL, OPEN TO WHITE FAMILIES RESIDING IN THE SURROUNDING COMMUNITY, IS NOT ENTITLED TO AN EXEMPTION FROM FEDERAL CIVIL RIGHTS LAWS AS A PRIVATE CLUB.**

### I. Introduction

Community swimming pools are a post World War II creature of affluent suburbia. In Maryland these pools have appeared within the past twenty years principally in the Baltimore-Washington suburbs both

in new housing subdivisions and older more established communities. A glance at the newspapers' real estate sections in these metropolitan areas quickly reveals the important sales advantages that access to a community pool entails.

While community pools may differ somewhat in size, manner of operation and organizational formalities, they are all similar in their public function; providing a recreational facility for a defined community. The common denominator for membership in all such pools is the interest of nearby homeowners in swimming. The pools differ from country clubs in that they lack any social or fraternal characteristics. Most if not all of these pools were constructed by neighborhood homeowners because suburban governments could not and did not respond to requests to provide these recreational facilities during an era of unprecedented population growth. *Hearing on H.R. 7125 Before the Finance Committee, 85th Cong., 2d Sess. (July 15, 16, 17, 1958)*. In Maryland, both state and local governments encouraged development of such pools. MD. ANN. CODE art 81, § 288(d)(8) (1969 Repl. Vol.); MONTGOMERY COUNTY, MD., CODE § 107-28(Z)(4) (1965).

The public policy of Maryland condemns racial discrimination in housing, employment and public accommodations. MD. ANN. CODE art 49B, § 1 *et seq.* (1972 Repl. Vol.). State commerce has benefited from this policy by attracting national businesses and their employees to Maryland and allowing all persons regardless of race to enjoy its abundance.

Most Maryland county pools have voluntarily submitted to state and local anti-discrimination laws.

Wheaton-Haven, operating as a haven for whites only, is an exception to this distinguished civic record.

Affirmation of the lower court will leave black Maryland home buyers in a quandary. While Maryland encourages full participation of blacks in all forms of community life, in order to do so blacks must carefully choose a home in a community with a recreational facility identical to that in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), and not one of Wheaton-Haven's character. The fact that black home buyers face this dilemma is contrary to the public policy of Maryland.

Application of existing legal principles demonstrates that Wheaton-Haven is not entitled to an exemption as a private club under anti-discrimination laws, federal, state or local.

## II. Private Club Exemption

There is no single test which may be invoked to establish whether a recreational facility is a public accommodation or a private club. Rather, a number of factors must be considered. These factors must be weighed in light of the "private club" exemption recited in Title II Civil Rights Act of 1964, 78 Stat. 243 (1964) 42 U.S.C. § 2000a(e) (1970) which protects only the "*genuine privacy* of private clubs . . . whose membership is genuinely *selective* . . ." 110 CONG. REC. 13697 (1964) (remarks of Senator Humphrey) (emphasis added).

Wheaton-Haven possesses the burden of proving its private club status, *United States v. Richberg*, 398 F. 2d 523 (5th Cir. 1968); *Nesmith v. YMCA*, 397 F. 2d 96 (4th Cir. 1968). The record shows conclusively that since its inception, Wheaton-Haven has provided

a public function and has never been private. The facts revealed to the Montgomery County Commission on Human Relations, *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, No. P.A.-6, (Montgomery County, Maryland, Commission on Human Relations, June 3, 1969), show that at its nascence, and throughout its existence, Wheaton-Haven has held itself out to be a public facility serving the imperative recreational needs of the immediate community. It was not until recently that the club insisted upon its private character solely for the purpose of preserving the right to discriminate against blacks who were members of the tax paying public the organization had promised to serve.

It is true that for many years, even before the passage of federal, state and local anti-discrimination laws, Wheaton-Haven possessed many characteristics that it now contends give it private club status. The nonprofit corporation has by-laws, a board of directors who are required to be members, applications for membership, initiation fees and yearly dues, geographical limitations on membership, guest rules and a ban on public admission. However, examination beyond these superficial characteristics of the operative nature of the Respondent discloses Wheaton-Haven's essential non-private character.

For example, emphasis was placed by the lower court upon the fact that Wheaton-Haven is "owned, operated and controlled entirely by its members" and that "regular membership meetings are held, and membership participation is strikingly high." *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 451 F. 2d 1121 at 1220. However, member-government was insufficient to establish private club status in either



*Sullivan v. Little Hunting Park, supra*, or *Bell v. Kenwood Golf and Country Club*, 312 F. Supp. 753 (D. Md. 1970).

In 1964, after six years of operation, Wheaton-Haven began to adopt additional characteristics of a private club. Wheaton-Haven began to interview applicants in 1964 (A. 5). Also in 1964, Wheaton-Haven refused to allow integrated swimming teams to compete at or use its facilities (A. 6). Again in 1964, Wheaton-Haven stopped permitting black baby sitters to accompany member children to the pool (A. 6). In 1968 Mrs. Rosner, a black guest of Mr. and Mrs. Tillman was allowed to use the pool. A short time later Wheaton-Haven promulgated a rule limiting guests to relatives of members. Since July 24, 1968, the Tillmans have not been allowed to bring Mrs. Rosner into the facility.

Dr. and Mrs. Press, requested an application in the spring of 1968 and were refused because of their race.

Clubs which are organized solely for the purpose of avoiding the law are considered sham organizations. *Daniel v. Paul*, 395 U.S. 298 (1969); *United States v. Richberg, supra*; *Bell v. Kenwood Golf and Country Club, Inc., supra*; *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969).

The creation of sham "clubs" was discussed at lengths during the Senate debates on the 1964 Civil Rights Act. Senator Humphrey stated the following in reply to a question concerning the possibility of abuse of the private club exemption,

If a club were established as a way of bypassing or avoiding the effect of the law that kind of a club would come under the language of the bill. S. REP. NO. 110, 88th Cong. 2nd Sess.—6008 (1964).

The congressional disapproval of sham clubs is clear and has been repeatedly found unlawful.

In *United States v. Clarksdale & Anderson Co.*, 288 F. Supp. 792 (N.D. Miss. 1965), a restaurant adopted private club trappings. The court found the only qualifications for membership in the alleged club to be nominal entrance fees and white skin. It was held that the organization was a sham club open only to whites. Wheaton-Haven fares no better under these principles.

### III. Genuine Selectivity

Wheaton-Haven has failed to establish the "plan or purpose of exclusiveness" characteristic of a purely private club. *Sullivan v. Little Hunting Park, supra*, at 236 (1969). Rather, membership has traditionally been open to white residents within a defined geographical area, there being no selective elements other than race. Several considerations show the non-exclusive nature of Wheaton-Haven.

**A. Exclusivity:** The opinion below also held, "the final test, and one of the more important ones, is the test of exclusivity." 451 F. 2d at 1220. This Court has held that a pool remarkably similar to Wheaton-Haven was neither private nor exclusive. In so holding, the Court stated,

The Virginia trial court rested on its conclusion that Little Hunting Park was a private social club. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographical area, there being no selective element other than race. *Sullivan v. Little Hunting Park*, at 236 (1969).

Nevertheless, the lower court saw an element of selectivity in the rejection of one white man in Wheaton-Haven's entire history. The extra record consideration of other rejected whites is contradicted by Wheaton-Haven's own admission. Normally, truly private clubs reject a significant proportion of applicants, and a low rejection ratio by an alleged private club is usually fatal to a claim for the private club exemption. In *Nesmith* only five applicants were rejected out of 1300 in one year; in *Stout v. YMCA*, 404 F. 2d 687 (5th Cir. 1968), of 3070 membership applications in one year only four were rejected; in *United States v. Jordan*, not one of 2400 applications for memberships were rejected; and in *Bell v. Kenwood Golf and Country Club, Inc.*, "substantial majority" of applicants was accepted.

The lower courts also saw the interviewing of prospective members as an element of selectivity. In fact, the Wheaton-Haven *did not conduct interviews* before 1964. The interview procedure which now exists is a cursory one designed to physically observe the color of the applicants' skin (A. 5-6). No social, formal or business background information is gathered. If an applicant lives within the three-quarter mile limit, he does not need the recommendation of a present member of Wheaton-Haven.

Lastly, the lower court states that the initiation fees and yearly dues have a selectively burdensome effect on members of the community which creates an automatic standard for the social and financial status of applicants. This is an empty criterion in two respects. First, the area in which Wheaton-Haven is located is one in which a \$375 initial fee and annual dues of \$50-60 are not "substantial" or "heavy" investments.

Montgomery County is one of the most affluent in the country. Second, similar facilities have been found non-private despite "substantial" fees. *Sullivan v. Little Park, supra*. In *Bell v. Kenwood Golf and Country Club* initiation fees were \$600-1,500, and annual dues were \$23-38; and in *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 2d 596, 219 A. 2d 161 (1966) new members were required to pay a \$350 debenture bond and a yearly fee of \$150. Virtually all community swimming pools involve "substantial" initiation fees and annual dues.

The lower court acknowledged that Wheaton-Haven was unable to produce clear, precise and unmistakable standards for membership. However, the lower court glossed over the lack of selectivity in Wheaton-Haven's membership policy and falls back on the assurance that Wheaton-Haven is "not in fact open to the public," a conclusion which the very lack of exclusivity or selectivity belies. Wheaton-Haven fails here at the crucial test; that of selectivity. The membership is, in effect, open to white families residing in the community. Its "private" label is merely an artificial barrier thrown up to justify the rejection of black members of the community.

**B. Purpose of the Organization:** The statutory exemption for distinctly private organizations is designed to protect the personal associational preferences of their members. *United States v. Richberg, supra*; *Clover Hill Swimming Club v. Goldsboro, supra*. However, Wheaton-Haven does not owe its existence to the associational preferences of its members but to the coincidence of their common interest in the swimming pool offered to the community for its enjoyment. *In re Holiday Sands, Inc.*, 9 RACE REL. L. REP. 2025 (1964).

Generally private clubs have some goal, purpose or interest aside from exclusion of other members of society. It is often considered that a private club must have a civic, fraternal or social purpose. *Moose Lodge No. 107 v. Irvis*, 40 U.S.L.W. 4715 (U.S. June 12, 1972); *United States v. Richberg*, *supra*. Wheaton-Haven's only purpose is to provide swimming facilities for the nearby white community. There are no social functions held at the facility to increase intimacy or association between members (A. 5). The fact that membership is not personal but runs to a family unit underscores Wheaton-Haven's non-social nature. Indeed, at the zoning hearings concerning Wheaton-Haven's application for a special zoning exception, Wheaton-Haven's witnesses testified that the pool was not intended to be used for private social functions (A. 4). It seems, therefore,

that where a club has a membership which . . . is not limited to intimate relationships, which draws no line other than race, which counts among its membership . . . the "general public," it cannot be called a "private club." It is, in fact, merely a building which houses the general white public which has gathered together for a particular activity, an activity which for some reason, cannot be shared with members of a minority group or race merely because of their physical features. Comment, *Current Developments in State Action and Equal Protection of the Law*, 4 GONZAGA L. REV. 233, at 272 (1969). (Emphasis added).

In view of these facts, the Respondent can find little comfort in the fact that Wheaton-Haven is a non-profit corporation. Courts will not enjoin discrimination motivated by profit and then allow discrimination for charity. *Williams v. Rescue Fire Co.*, 254 F. Supp. 556 (D. Md. 1966).



**C. Public Solicitation:** The opinion below held that Wheaton-Haven does not "publically solicit members." 451 F. 2d at 1220 (1971). This is a misleading conclusion. During 1958, when Wheaton-Haven was required to meet county zoning requirements by demonstrating that sixty (60) percent of construction costs were obligated or subscribed, an extensive membership drive was conducted (A. 5). Circulars were distributed to the communities surrounding the proposed pool site (A. 4). Door-to-door solicitations of these communities were also conducted, the *only* qualification for charter membership then being the ability to pay a minimum twenty dollar (\$20) pledge (A. 4). At that time no county, state or federal antidiscrimination laws were in existence. Since that time and until 1968 a sign hanging conspicuously outside the pool gave the telephone number of the membership chairman, and served as an open invitation to membership to those living in the surrounding communities (A. 6). During this period it was common knowledge in the community that pool membership was open to all in the surrounding white community (A. 6). While Wheaton-Haven is not a pool open to the public at large, in the sense of the facility in *Daniel v. Paul*, it is, as are all community pools, open to those living in a limited geographic area and in this sense, is indistinguishable from the facility in *Sullivan*.

**D. Public Service:** Though the opinion below held that Wheaton-Haven's "members are not limited to, nor does it purport to serve all of, the 'general public' in any recognizable community," 451 F. 2d at 1219, this conclusion does not square with the fact that thirty per cent of the members may come from outside a three-quarter mile radius from the pool, and only one

white family within the defined area has ever been rejected. Rather than serving a select group of people, chosen by some articulated standards, Wheaton-Haven extends its benefits to the white population which lives within a specific radius. This has the effect of enhancing the value of homes located therein. Likewise any formal or actual ceiling membership is correlated only to the facility's physical capacity for use and does not constitute any demonstrable element of selectivity. *Castle Hill Beach Club v. Arbury, N. Y.*, 2 N.Y. 2d 596, 162 N. Y. S. 2d 1, 142 N.E. 2d 186 (1957) The facilities of all accommodations, public and private, are limited in the number of persons who can be effectively and efficiently served, and this limitation does not change an otherwise public accommodation into a private one *Clover Hill Swimming Club v. Goldsboro, supra*. The facility in *Sullivan* had similar provisions and this Court rejected the Virginia court's designation of the club as private.

This Court recently declared that a characteristic of a public accommodation is that it be

located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the state.

*Moose Lodge No. 107 v. Irvis, supra* at 4719. Unlike *Moose Lodge*, "ostentatiously proclaiming the fact that it is not open to the public at large," Wheaton-Haven has purported to serve imperative recreational needs of the community which have not been fulfilled by the government. In order to qualify for a special zoning exception, the promoters of the pool testified that the pool was needed to deter juvenile delinquency in the community and was meant to be a public benefit to the

community at large. The image that the Wheaton-Haven founders created was that of a group of concerned neighbors trying to meet the recreational needs of the community by financing and maintaining facility in lieu of a county-built facility (A. 4). Wheaton-Haven therefore took upon itself a responsibility to the community, and upon these representations the special zoning exception was granted (A. 4).

Wheaton-Haven chose its status as a community pool over another existing but more stringent zoning category designated as "private club." MONTGOMERY COUNTY, MD., CODE § 111-37(n) (1965). The County government encouraged the development of community pools under this zoning classification (A. 3-4). In addition, as a community pool Wheaton-Haven gained state and federal tax exemptions. INT. REV. CODE OF 1954, § 501(c) (17); MD. ANN. CODE Art 81, § 288(d) (8) (1969 Repl. Vol.).

In 1962 the Montgomery County Council declared that swimming pools were public accommodations subject to the County's anti-discrimination laws, MONTGOMERY COUNTY, MD., CODE § 77-1 *et seq.* (1965). At the time this law was enacted there were no government owned or operated swimming pools in Montgomery County. There were, however, forty-three (43) community pools, including Wheaton-Haven (A. 9).

To label Wheaton-Haven—and inferentially similar pools—private in light of the fact that the promoters, the community, and the Montgomery County government all regarded Wheaton-Haven as a non-private community facility, is to subvert the needs of the community, Wheaton-Haven's community obligation, the public policies of Montgomery County, the State of Maryland and the United States.

### CONCLUSION

Therefore, because the members of Wheaton-Haven do not in fact control membership through recommendation, selection and revocation procedures; because the number of members is limited only by the capacity of the facility and there are no genuinely selective qualifications for membership other than race and because Wheaton-Haven's birth was due to its "billing" as a public benefit to the community at large, the conclusion is inescapable that the facility was conceived and has been maintained as a non-private organization which has neither the accoutrements nor the spirit of exclusivity.

For the foregoing reasons, Wheaton-Haven Recreation Association, Inc. should not be entitled to an exemption as a private club under Title II of the Civil Rights Act of 1964, and therefore the judgment below should be reversed.

Respectfully submitted,

PHILIP J. TIERNEY  
General Counsel  
State of Maryland  
Commission on Human Relations

VALERIE L. OLSON  
Staff Attorney

ELIZABETH TOCKMAN  
Staff Attorney

*Of Counsel:*

GEORGE D. SOLTER  
Chairman

Mount Vernon Building  
701 St. Paul Street  
Baltimore, Maryland 21202\*  
383-3687

June 1972

---

\* The Commission wishes to acknowledge the assistance of University of Maryland Law students Michael O. Ramsey and Althea Lee Walker.

## APPENDIX

MONTGOMERY COUNTY COMMISSION ON HUMAN RELATIONS  
PANEL ON PUBLIC ACCOMMODATIONS

CASE No. P. A. 6

MR. AND MRS. MURRAY TILLMAN AND DR. AND  
MRS. HARRY CODY PRESS, *Complainants*

v.

WHEATON-HAVEN RECREATION ASSOCIATION,  
INC., *Respondents***Opinion, Including Findings of Fact, Conclusion of Law,  
Panel Decree and Final Order**

On September 17, 1968, Mr. and Mrs. Murray Tillman instituted a complaint against the respondent, Wheaton-Haven Recreation Association, Inc., alleging violation of the County Public Accommodations Ordinance, Chap. 77, Sec. 77-9 and 10, Laws of Montgomery County (1968) (hereinafter referred to as the "Ordinance").

The basis of the complaint alleges that on July 24, 1968, Mrs. Grace Rosner, a Negro, was refused admittance to respondent's pool as a guest of the Tillmans, bona fide members of respondent. This refusal to admit Mrs. Rosner was allegedly based upon her lack of family relationship to a member despite the fact that she was admitted as a guest on July 19, 1968 and the family relationship criteria was not applied to Caucasian guests. The complaint also made reference to a long-standing policy of systematic racial discrimination and deprivation to some of respondent's members of their basic legal rights. These allegations were supported by accompanying affidavits, executed by several members of respondent.

On November 13, 1968, Dr. and Mrs. Harry Cody Press also instituted a complaint against the respondent, similarly alleging a violation of the Ordinance. The Press complaint



was based upon allegations that they were deprived of a membership application and subsequent admission to membership in May, 1968, solely on the ground that they are Negroes.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the Executive Secretary of the County Human Relations Commission, Bertram L. Keys, Jr., conducted an investigation of the facts and made a finding of probable cause to credit the allegations contained in the complaints. Mr. Keys also attempted unsuccessfully to conciliate the matter pursuant to the foregoing section of the Ordinance and has notified respondent that his office is still available for this purpose up to and including the present date.

The Commission's Panel on Public Accommodations ordered the complaints consolidated for a determination of the common issue involved and conducted a public hearing at 8:00 o'clock P.M., April 24, 1969, in the first floor auditorium of the County Office Building, 108 South Perry Street, Rockville, Maryland. The hearing was conducted pursuant to Sec. 77-5(3)(b) of the Ordinance.

The panel consisted of Gerald D. Morgan, Chairman and Presiding Officer, Dr. Thomas A. Cook, Jr., and Lawrence D. Burke, Commissioner. The case in support of the complaints was presented by Philip J. Tierney, Esq., Assistant County Attorney. Also participating were Stanley D. Abrams, Esq., Assistant County Attorney, and Samuel A. Chaitovitz, Esq., of the American Civil Liberties Union, representing Mr. and Mrs. Tillman.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the respondent was summoned to appear through four (4) representatives alleged in the complaint to have fostered the violation of the Ordinance. The four, Philip Trusso, Bernard Katz, Anthony J. DeSimone, and Brian Carroll, avoided the summons and did not appear. Counsel for respondent, William N. Dunphy, Esq., appeared and ad-

vised the Panel that his client did not choose to be present and challenged *inter alia* the jurisdiction of the Panel to conduct the hearing as respondent was alleged to be distinctly private in nature. Mr. Dunphy advised the Panel of equitable relief sought on behalf of respondent in the Circuit Court for Montgomery County and requested the hearing be suspended pending the outcome of his litigation. The Panel overruled respondent's motion. Mr. Dunphy then left and the Panel proceeded with the hearing.

As a result of all the evidence received at the public hearing, the Panel members make the following findings of fact, conclusion of law, decision, and final order.

#### FINDINGS OF FACT

1. The complainants, Mr. and Mrs. Murray Tillman, are taxpaying residents of the County and have been bona fide members of respondent since 1961.

2. The complainants, Dr. and Mrs. Press, have been taxpaying residents of the County since 1965. The Presses are Negroes. They live within the prescribed geographical boundaries, as contained in respondent's By-Laws, that would make them available for membership in respondent.

3. Respondent, Wheaton-Haven Recreation Association, Inc., is a non-profit Maryland corporation organized on May 23, 1958 for the purpose of operating a swimming pool for the recreation of the prescribed community. The respondent's business address is 10910 Horde Street, Silver Spring, Maryland, 20902.

4. Respondent pool was constructed in 1958-1959 subsequent to a special exception granted September 23, 1958 by the Montgomery County Board of Appeals, pursuant to Zoning Ordinance as recited in Sec. 107-28(Z-4), Montgomery County Code (1955).

5. The foregoing zoning provision was enacted by the Montgomery County Council by Ordinance No. 3-28,

dated May 24, 1955. The Council stated therein that "... this action sets up the community swimming pools as a special exception. . . . The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

6. On August 13 and August 23, 1958, the Board of Appeals conducted public hearings on Case No. 656, respondent application for the special exception. The record of these proceedings indicates that respondent's witnesses testified that the County was unsuccessfully approached to construct a pool, that in lieu of County action respondent initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

7. Prior to the grant of the special exception, the Board required respondent to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed. During early 1958, respondent conducted an intensive membership drive. A circular was published and distributed to surrounding neighborhoods and communities that requested an immediate and unqualified call for membership. Apparently no Negroes lived within the geographic area of the pool at the time. Door-to-door solicitations were conducted by respondent members to obtain membership and a minimum Twenty Dollar (\$20.00) pledge. No qualifications were placed upon the respondent solicitors regarding membership criteria. On July 9, 1958 an open meeting was conducted by respondent's promoters on public grounds, the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, to further solicit and promote membership. These efforts resulted in meeting the zoning requisites.

8. During hearing before the U. S. Senate Finance Committee regarding H. R. 7125 (later to become P. L. 85.859—Excise Tax Exemption) conducted on July 15, 16, and 17, 1958, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified that the community pool was an instrument utilized to serve an imperative recreational need in Montgomery County owing to the failure of government to construct public pools due to lack of adequate resources. The pools were held to provide a healthy and constructive outlet for youth and general benefit to the public at large. The pools provide recreation to lower middle income groups that would otherwise be unavailable. The community pool was held distinguished from private country clubs and their attendant social program.

9. On June 12, 1962, the County Council adopted the Ordinance, Sec. 2 of which specifically provided that the definition of a public accommodation shall include swimming pools. At the time the Ordinance was enacted, there were no public, government-operated, swimming pools in existence within Montgomery County. There were, however, forty-three (43) community pools in operation in the County, including respondent.

10. Respondent is exempt from and does not pay federal or state income taxes under the provision of the U. S. Internal Revenue Code, Chapter 501, Sec. C(7) and the Maryland Code, Art. 81, Sec. 88(g)(8). Respondent also obtained an exemption from U. S. Excise Taxes during the years 1958 through 1964. All this tax relief was granted respondent because of its function as a community swimming facility.

11. Respondent operates exclusively as a community swimming facility conducting no social functions and its membership is solicited solely for that recreational purpose.

12. Before 1964 respondent did not conduct personal interviews with applicants. Recently respondent has insti-

tuted a policy of conducting personal interviews with applicants, but no social, formal or business background data is obtained from these interviews. The sole purpose of the interview is apparently to observe the physical appearance of the applicant.

13. Membership in respondent is not personal to the individual but runs to family units.

14. Respondent's By-Laws, adopted July 31, 1958, contain no racial covenants or restrictions on membership which is limited only to a prescribed geographic area and thirty (30) percent of the total membership may be excluded from that limitation.

15. By 1967 the neighborhood within the prescribed geographic area was a well-integrated community.

16. No Caucasian applicant has ever been rejected for membership in respondent.

17. Respondent, until May, 1968, posted the telephone number of the membership chairman on a large sign located in a conspicuous position at the pool, thus serving as an open invitation for membership. It was common knowledge in the community that respondent membership was open.

18. Until the summer of 1964, no racial discrimination policy was overtly manifested by respondent. That summer respondent refused to permit integrated swimming teams to utilize respondent facility. Some of respondent's members protested this policy and sought to change it. However, on November 11, 1964, at the annual open membership meeting of respondent, a proposal to change the swim team racial policy was rejected.

19. Subsequently, respondent refused to admit into the pool Negro babysitters who cared for children of members, while Caucasian babysitters of members were admitted.

20. On July 19, 1968, Mrs. Grace Rosner, a Negro, accompanied the Tillmans as their guest to respondent pool



and was admitted to the pool despite an altercation with Anthony J. DeSimone, who attempted to prohibit the admission of Mrs. Rosner. On July 24, 1968, Mrs. Rosner returned to the pool with the Tillmans, but was denied admission because of a newly promulgated rule that limited guests only to relatives of respondent members. This rule was not in existence prior to July 20, 1968. The rule was not enforced toward Caucasian guests. The respondent, through its gate attendants and officers, instructed members to lie about the relationship of their Caucasian guests, thereby avoiding the application of the rule.

21. In April, 1968, respondent, upon a good faith inquiry, failed to send a membership application to Dr. and Mrs. Press. The Presses have been and presently are willing to join respondent and are able to assume the financial responsibilities of membership. The Presses intended to use respondent pool as a convenient recreational facility that is available to their Caucasian neighbors and the Caucasian playmates of their children. In May, 1968, respondent officials expressly refused to consider the Presses for membership solely because of their race.

22. Brian Carroll, Anthony J. DeSimone, Bernard Katz, and Philip Trusso, officials of respondent, published and promoted on several occasions to witnesses appearing before the Panel that respondent pool was segregated and had a policy to continue such segregation.

23. On November 12, 1968, at a general membership meeting, the membership of respondent, by a vote of 81-25, endorsed the discriminatory policies practiced to that date.

#### CONCLUSIONS OF LAW

The core issue deals with whether the composition of people gathered at a swimming pool open to the neighborhood must include Negro friends and neighbors. If the complainants possess legally protected rights which respondent has abused, the respondent's conduct must

be circumscribed to comply with these rights. The respondent planned and built a swimming pool with its own funds to provide recreation for a prescribed community in Wheaton. Respondent contends the pool is private, that complainants have no rights concerning the pool, and it is free to pick and choose those who can swim. The view we take renders these contentions sophistic.

# I

A party claiming exemption from the Ordinance as an organization distinctly private in nature has the burden of demonstrating this assertion. Respondent's failure to appear and present evidence of a private nature does not help its case, but the purposes of our analysis we have attempted to view the facts in a light most favorable to respondent. The exemption to the Ordinance was designed to cover private organizations created to protect the personal associational preference of its members. However, a naked claim that an organization is private in nature will not stand if an examination reveals the organization lacks the characteristics usually attributed to such a private organization. We shall first examine respondent's qualification for this exemption.

The pool was built and operated solely as a community recreational facility and possesses none of the accoutrements of a private club, that is, rank, society, and selectivity. The pool has been accessible to the entire neighborhood Caucasian population without qualification. In fact, respondent's By-Laws allow thirty (30) percent of the membership to come from the *public at large*. The only concrete membership standard that has surfaced during respondent's existence is the ability to pay. The pool operates no social programs and the membership itself runs to the family unit rather than the individual. That respondent exercises no policy of genuine selectivity is manifested by the open invitation to neighborhood Caucasians with no evidence any of these applicants were ever rejected.

The recent employment of the interview device and a relatives-only guest rule supposedly throws a blanket of selectivity over respondent. However, the facts indicate these methods were merely a subterfuge, the objective of which was to test the color of the applicants' skin and exclude Negroes. Neither device has been applied consistently to Caucasians nor has respondent ever pursued a policy of exclusiveness toward Caucasians. By application of these afterthoughts, respondent attempts to take on a new appearance; we find he cannot use such methods to make a private club out of an organization with an alien nature.

But perhaps the most conclusive evidence of respondent's true nature can be found in the testimony submitted on its behalf before the zoning authority. That testimony gave no hint of a private nature or an interest by respondent in being so classified. Respondent's very existence and purpose was heralded as a public benefit—juvenile delinquency would be curtailed, restless youths would be given a playground, and an imperative community recreational need would be satisfied. To now contend that respondent is distinctly private in nature after the benefits of a favored status accorded by the government have been enjoyed since 1958 would cast considerable doubt on respondent's good faith and credibility. We therefore hold respondent has never been distinctly private in nature.

The factor which absolutely convinces us that respondent is a public accommodation is a reading of the Ordinance which expressly covers swimming pools. When the Ordinance was enacted by the County Council in 1962, forty-three community pools were in operation, including respondent. There were no government-operated pools in existence and community pools were the closest to the definition, "public." It would appear that the Council intended such swimming pools to be classified as a public accommodation since such was the holding by the Maryland Court of Appeals before enactment of the Ordinance.

*Drews v. State*, 224 Md. 186, 167 A.2d 341 (1960). If the Council intended to limit the definition of swimming pools to exclude the community pools, an exception could have easily been written into the Ordinance as was the case with taverns. Furthermore, the list of public accommodations could have excluded recreational areas as was the case with the State law. *Maryland Code*, Art. 49B, § 11, *et seq.* Therefore, it is only reasonable to infer from the ordinary meaning of the words used that the Ordinance was intended to cover community swimming pools, the only swimming pools in existence at the time. We hold that respondent is a public accommodation within the meaning of the Ordinance.

## II.

Beyond the technical application of the Ordinance, serious questions concerning the substantive application of the Ordinance have been raised by respondent's particular conduct toward the complainants. The nature of respondent's operation, its government subsidies, open solicitation of Caucasian membership, and the public benefit aspects of its construction and operation give rise to a classification of respondent as a public function under the doctrine of *Evans v. Newton*, 382 U.S. 296 (1966). Therefore, respondent would be subject to the same limitation as the State.

The sale of real estate within the prescribed area contained in respondent's By-Laws is enhanced because of the proximity, accessibility, and advantages incident to a community swimming pool. This factor will allow Caucasians to sell to Caucasians at a premium. Negroes must pay the premium without receiving the corresponding benefits or forego purchase of a house in the prescribed area. The result of this policy deprives the Negro of basic legal rights.

Some pool members are forced, through the inconsistent application of the relatives-only guest policy to limit their

social experiences or forego use of the pool. The result of such an arbitrary standard is to circumscribe and discourage the free associational conduct of these members and also deprives them of basic legal rights.

The full thrust of respondent's policy would tend to discourage Negroes from moving into the prescribed area. In effect, respondent, through its policy of systematic discrimination, has created a racial zoning ordinance without County sanction. These are areas that the public accommodations ordinance is certainly intended to protect and respondent, as public function, may not operate to derogate this intent. It is therefore unlawful for any place of public accommodation in the County to practice racial discrimination in granting membership or admitting guests when guests are so provided by the organization's own regulations. However, in the instant case, it has been demonstrated that respondent received and continues to receive special treatment by the government in the form of tax exemptions, liberal zoning laws, and various other consideration during the initial building stage. These factors tend to impose an even higher standard of duty upon respondent to refrain from practicing racial discrimination.

### III.

The several incidents of alleged racial discrimination are well supported and uncontroverted. A Negro was excluded from the pool as a guest of a bona fide member on the basis of lack of relationship to member. However, Caucasians were admitted with the same lack of membership and told to lie about it. It is clear the family relationship rule and its application was a mere contrivance to exclude Negroes from an otherwise open facility. Such practices are unlawful.

A Negro family applied for pool membership while filling all of the apparent requisites set for Caucasian applicants. Their unexplained exclusion was clearly discriminatory and unlawful.



Several respondent officials published and promoted the racial discrimination policy stated above, also in violation of the Ordinance. It is clear from a total view of respondent's conduct over the years that it has practiced an unlawful and systematic policy of racial discrimination. The respondent was clearly an open facility regarding Caucasian guests and residents. The only restrictions were applied toward the Negro guest and resident.

#### PANEL'S DECISION

And now, May 29, 1969, upon consideration of all the evidence submitted at the public hearing of this case, the finding of fact, and the conclusion of law, the Montgomery County Human Relations Commission Public Accommodation Panel unanimously finds and determines:

1. The Panel has jurisdiction over respondent, over the subject matter of this proceeding, and over the instant complaint.
2. The respondent, Wheaton-Haven Recreation Association, Inc., is a public accommodation as that term is defined in the Ordinance, Sec. 77-9.
3. The respondent has refused, withheld from, and denied to the complainants, solely because of race, the accommodations and advantages of the respondent's community swimming pool, either as members or guests, and consequently respondent has committed and continues unlawful discriminatory practice in violation of the Ordinance, Sec. 77-10.
4. Respondent, operating as a public function and under the Ordinance, cannot promote policies of racial discrimination excluding Negroes to the extent its facilities are available and open to Caucasians.

**FINAL ORDER**

And now, May 29, 1969, upon consideration of the foregoing, and pursuant to Sec. 77-5 of the Ordinance, it is hereby **ORDERED**:

1. That the respondent, Wheaton-Haven Recreation Association, Inc., its agents, employees and members, shall cease and desist from directly or indirectly refusing, withholding from, or denying to complainants and other persons, because of their race, color, religion, creed, ancestry or national origin, the accommodations and advantages of membership and guest privileges in the respondent community swimming pool facility or the use and enjoyment thereof.

2. That the respondent, Wheaton-Haven Recreation Association, Inc., shall take the following affirmative action which in the judgment of the Panel will effectuate the purposes of the Ordinance.

a. Instruct all its members, officers, managers, and employees, in writing, to comply with the requirements of Paragraph 1 of this Final Order. Copies of such written instruction, signed by all of respondent's officers, managers, and employees, acknowledging receipt and understanding thereof shall be transmitted to the Panel within fifteen (15) days after service of this Final Order.

b. Notify all members of respondent, in writing, that henceforth the policy and practice of respondent will be to serve any guest of a member regardless of his race, religion or national origin and that new members will be considered without regard to race, religion or national origin. A copy of such written communication shall likewise be transmitted to the Panel.

3. Failure to comply with this Order within the specified time will subject the respondent and its officers, jointly and severally, to the liabilities imposed by the Ordinance. This in no way limits the Panel or the Human Relations

Commission from pursuing any of the rights and remedies provided by law.

BY ORDER OF

THE MONTGOMERY COUNTY, MARYLAND,  
HUMAN RELATIONS COMMISSION PANEL  
ON PUBLIC ACCOMMODATIONS

GERALD D. MORGAN, *Chairman*  
DR. THOMAS A. COOK, JR.  
LAWRENCE D. BURKE



# INDEX

..... below	Page
.....	1
.....	1
..... presented	2
..... involved	2
..... of the United States	3
.....	3
.....	3
.....	8
Introduction and summary	8
Racial discrimination with respect to membership in Wheaton-Haven Recreation Association, Inc., violates Section 1 of the Civil Rights Act of 1866 and is not authorized by the "private club" exception to the Civil Rights Act of 1964	12
A. Section 1982 prohibits respondents' conduct	12
B. The "private club" exception to the Civil Rights Act of 1964 is not applicable here	21
.....	27
.....	27

## CITATIONS

<i>Barrows v. Jackson</i> , 346 U.S. 249	13
<i>Bell v. Kenwood Golf and Country Club, Inc.</i> , 512 F. Supp. 753	23
<i>Boynton v. Virginia</i> , 364 U.S. 454	3
<i>Burton v. Wilmington Parking Authority</i> , 365 U.S. 715	3
<i>Caldwell v. National Brewing Co.</i> , 443 F. 2d 1044, certiorari denied, 405 U.S. 916	24



## Cases—Continued

<i>Daniel v. Paul</i> , 395 U.S. 298	3, 22, 23
<i>Hunter v. Erickson</i> , 393 U.S. 385	3
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409	3, 8,
9, 10, 11, 13, 16, 19, 20, 24, 26	
<i>Nemith v. YMCA of Raleigh, N.C.</i> , 397 F. 2d	
96	23
<i>Palmer v. Thompson</i> , 403 U.S. 217	3
<i>Rockefeller Center Luncheon Club, Inc. v.</i>	
<i>Johnson</i> , 131 F. Supp. 703	23
<i>Sanders v. Dobbs Houses, Inc.</i> , 431 F. 2d 1007	24
<i>Shelley v. Kraemer</i> , 384 U.S. 1	3, 22
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S.	
229	3, 7,
8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 21, 22,	
23, 25, 26, 27	
<i>Traffante v. Metropolitan Life Ins. Co.</i> , No.	
71-798, certiorari granted, February 22,	
1972	27
<i>United States v. Johnson</i> , 390 U.S. 565	25
<i>United States v. Rickberg</i> , 398 F. 2d 523	23
<i>Walker v. Pointer</i> , 304 F. Supp. 56	27
<i>Young v. International Telephone &amp; Telegraph</i> ,	
438 F. 2d 757	24
Statutes:	
Civil Rights Act of 1866, Section 1, 14 Stat.	
27	9, 24
Civil Rights Act of 1964, Title II, 78 Stat. 243	
(42 U.S.C.):	
Section 2000a	7
Section 2000a(a)	2, 23
Section 2000a(b)	4, 24
Section 2000a(c)	24
Section 2000a(e)	2, 4, 6, 21
Section 2000a-3	24
Section 2000a-5	24
Section 2000a-6(b)	24

### III

#### Statutes—Continued

	Page
Civil Rights Act of 1968, 42 U.S.C. 3601, <i>et seq.</i> -----	3, 24
Enforcement Act of May 31, 1870, Section 16 and 18, 16 Stat. 140, 144-----	10
42 U.S.C. 1981-----	10, 24, 25
42 U.S.C. 1982-----	2, 3, 4, 8, 9, 10, 12, 13, 14, 16, 20, 21, 25, 26, 27
42 U.S.C. 2000g-2000g-3-----	24
<b>Miscellaneous:</b>	
Cong. Globe, 39th Cong., 1st Sess., p. 474---	17
Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess.---	25

19	1908-1909	1908-1909
20	1909-1910	1909-1910
21	1910-1911	1910-1911
22	1911-1912	1911-1912
23	1912-1913	1912-1913
24	1913-1914	1913-1914
25	1914-1915	1914-1915
26	1915-1916	1915-1916
27	1916-1917	1916-1917
28	1917-1918	1917-1918
29	1918-1919	1918-1919
30	1919-1920	1919-1920
31	1920-1921	1920-1921
32	1921-1922	1921-1922
33	1922-1923	1922-1923
34	1923-1924	1923-1924
35	1924-1925	1924-1925
36	1925-1926	1925-1926
37	1926-1927	1926-1927
38	1927-1928	1927-1928
39	1928-1929	1928-1929
40	1929-1930	1929-1930
41	1930-1931	1930-1931
42	1931-1932	1931-1932
43	1932-1933	1932-1933
44	1933-1934	1933-1934
45	1934-1935	1934-1935
46	1935-1936	1935-1936
47	1936-1937	1936-1937
48	1937-1938	1937-1938
49	1938-1939	1938-1939
50	1939-1940	1939-1940
51	1940-1941	1940-1941
52	1941-1942	1941-1942
53	1942-1943	1942-1943
54	1943-1944	1943-1944
55	1944-1945	1944-1945
56	1945-1946	1945-1946
57	1946-1947	1946-1947
58	1947-1948	1947-1948
59	1948-1949	1948-1949
60	1949-1950	1949-1950
61	1950-1951	1950-1951
62	1951-1952	1951-1952
63	1952-1953	1952-1953
64	1953-1954	1953-1954
65	1954-1955	1954-1955
66	1955-1956	1955-1956
67	1956-1957	1956-1957
68	1957-1958	1957-1958
69	1958-1959	1958-1959
70	1959-1960	1959-1960
71	1960-1961	1960-1961
72	1961-1962	1961-1962
73	1962-1963	1962-1963
74	1963-1964	1963-1964
75	1964-1965	1964-1965
76	1965-1966	1965-1966
77	1966-1967	1966-1967
78	1967-1968	1967-1968
79	1968-1969	1968-1969
80	1969-1970	1969-1970
81	1970-1971	1970-1971
82	1971-1972	1971-1972
83	1972-1973	1972-1973
84	1973-1974	1973-1974
85	1974-1975	1974-1975
86	1975-1976	1975-1976
87	1976-1977	1976-1977
88	1977-1978	1977-1978
89	1978-1979	1978-1979
90	1979-1980	1979-1980
91	1980-1981	1980-1981
92	1981-1982	1981-1982
93	1982-1983	1982-1983
94	1983-1984	1983-1984
95	1984-1985	1984-1985
96	1985-1986	1985-1986
97	1986-1987	1986-1987
98	1987-1988	1987-1988
99	1988-1989	1988-1989
100	1989-1990	1989-1990
101	1990-1991	1990-1991
102	1991-1992	1991-1992
103	1992-1993	1992-1993
104	1993-1994	1993-1994
105	1994-1995	1994-1995
106	1995-1996	1995-1996
107	1996-1997	1996-1997
108	1997-1998	1997-1998
109	1998-1999	1998-1999
110	1999-2000	1999-2000
111	2000-2001	2000-2001
112	2001-2002	2001-2002
113	2002-2003	2002-2003
114	2003-2004	2003-2004
115	2004-2005	2004-2005
116	2005-2006	2005-2006
117	2006-2007	2006-2007
118	2007-2008	2007-2008
119	2008-2009	2008-2009
120	2009-2010	2009-2010
121	2010-2011	2010-2011
122	2011-2012	2011-2012
123	2012-2013	2012-2013
124	2013-2014	2013-2014
125	2014-2015	2014-2015
126	2015-2016	2015-2016
127	2016-2017	2016-2017
128	2017-2018	2017-2018
129	2018-2019	2018-2019
130	2019-2020	2019-2020
131	2020-2021	2020-2021
132	2021-2022	2021-2022
133	2022-2023	2022-2023
134	2023-2024	2023-2024
135	2024-2025	2024-2025
136	2025-2026	2025-2026
137	2026-2027	2026-2027
138	2027-2028	2027-2028
139	2028-2029	2028-2029
140	2029-2030	2029-2030
141	2030-2031	2030-2031
142	2031-2032	2031-2032
143	2032-2033	2032-2033
144	2033-2034	2033-2034
145	2034-2035	2034-2035
146	2035-2036	2035-2036
147	2036-2037	2036-2037
148	2037-2038	2037-2038
149	2038-2039	2038-2039
150	2039-2040	2039-2040
151	2040-2041	2040-2041
152	2041-2042	2041-2042
153	2042-2043	2042-2043
154	2043-2044	2043-2044
155	2044-2045	2044-2045
156	2045-2046	2045-2046
157	2046-2047	2046-2047
158	2047-2048	2047-2048
159	2048-2049	2048-2049
160	2049-2050	2049-2050
161	2050-2051	2050-2051
162	2051-2052	2051-2052
163	2052-2053	2052-2053
164	2053-2054	2053-2054
165	2054-2055	2054-2055
166	2055-2056	2055-2056
167	2056-2057	2056-2057
168	2057-2058	2057-2058
169	2058-2059	2058-2059
170	2059-2060	2059-2060
171	2060-2061	2060-2061
172	2061-2062	2061-2062
173	2062-2063	2062-2063
174	2063-2064	2063-2064
175	2064-2065	2064-2065
176	2065-2066	2065-2066
177	2066-2067	2066-2067
178	2067-2068	2067-2068
179	2068-2069	2068-2069
180	2069-2070	2069-2070
181	2070-2071	2070-2071
182	2071-2072	2071-2072
183	2072-2073	2072-2073
184	2073-2074	2073-2074
185	2074-2075	2074-2075
186	2075-2076	2075-2076
187	2076-2077	2076-2077
188	2077-2078	2077-2078
189	2078-2079	2078-2079
190	2079-2080	2079-2080
191	2080-2081	2080-2081
192	2081-2082	2081-2082
193	2082-2083	2082-2083
194	2083-2084	2083-2084
195	2084-2085	2084-2085
196	2085-2086	2085-2086
197	2086-2087	2086-2087
198	2087-2088	2087-2088
199	2088-2089	2088-2089
200	2089-2090	2089-2090
201	2090-2091	2090-2091
202	2091-2092	2091-2092
203	2092-2093	2092-2093
204	2093-2094	2093-2094
205	2094-2095	2094-2095
206	2095-2096	2095-2096
207	2096-2097	2096-2097
208	2097-2098	2097-2098
209	2098-2099	2098-2099
210	2099-2100	2099-2100
211	2100-2101	2100-2101
212	2101-2102	2101-2102
213	2102-2103	2102-2103
214	2103-2104	2103-2104
215	2104-2105	2104-2105
216	2105-2106	2105-2106
217	2106-2107	2106-2107
218	2107-2108	2107-2108
219	2108-2109	2108-2109
220	2109-2110	2109-2110
221	2110-2111	2110-2111
222	2111-2112	2111-2112
223	2112-2113	2112-2113
224	2113-2114	2113-2114
225	2114-2115	2114-2115
226	2115-2116	2115-2116
227	2116-2117	2116-2117
228	2117-2118	2117-2118
229	2118-2119	2118-2119
230	2119-2120	2119-2120
231	2120-2121	2120-2121
232	2121-2122	2121-2122
233	2122-2123	2122-2123
234	2123-2124	2123-2124
235	2124-2125	2124-2125
236	2125-2126	2125-2126
237	2126-2127	2126-2127
238	2127-2128	2127-2128
239	2128-2129	2128-2129
240	2129-2130	2129-2130
241	2130-2131	2130-2131
242	2131-2132	2131-2132
243	2132-2133	2132-2133
244	2133-2134	2133-2134
245	2134-2135	2134-2135
246	2135-2136	2135-2136
247	2136-2137	2136-2137
248	2137-2138	2137-2138
249	2138-2139	2138-2139
250	2139-2140	2139-2140
251	2140-2141	2140-2141
252	2141-2142	2141-2142
253	2142-2143	2142-2143
254	2143-2144	2143-2144
255	2144-2145	2144-2145
256	2145-2146	2145-2146
257	2146-2147	2146-2147
258	2147-2148	2147-2148
259	2148-2149	2148-2149
260	2149-2150	2149-2150
261	2150-2151	2150-2151
262	2151-2152	2151-2152
263	2152-2153	2152-2153
264	2153-2154	2153-2154
265	2154-2155	2154-2155
266	2155-2156	2155-2156
267	2156-2157	2156-2157
268	2157-2158	2157-2158
269	2158-2159	2158-2159
270	2159-2160	2159-2160
271	2160-2161	2160-2161
272	2161-2162	2161-2162
273	2162-2163	2162-2163
274	2163-2164	2163-2164
275	2164-2165	2164-2165
276	2165-2166	2165-2166
277	2166-2167	2166-2167
278	2167-2168	2167-2168
279	2168-2169	2168-2169
280	2169-2170	2169-2170
281	2170-2171	2170-2171
282	2171-2172	2171-2172
283	2172-2173	2172-2173
284	2173-2174	2173-2174
285	2174-2175	2174-2175
286	2175-2176	2175-2176
287	2176-2177	2176-2177
288	2177-2178	2177-2178
289	2178-2179	2178-2179
290	2179-2180	2179-2180
291	2180-2181	2180-2181
292	2181-2182	2181-2182
293	2182-2183	2182-2183
294	2183-2184	2183-2184
295	2184-2185	2184-2185
296	2185-2186	2185-2186
297	2186-2187	2186-2187
298	2187-2188	2187-2188
299	2188-2189	2188-2189
300	2189-2190	2189-2190
301	2190-2191	2190-2191
302	2191-2192	2191-2192
303	2192-2193	2192-2193
304	2193-2194	2193-2194
305	2194-2195	2194-2195
306	2195-2196	2195-2196
307	2196-2197	2196-2197
308	2197-2198	2197-2198
309	2198-2199	2198-2199
310	2199-2200	2199-2200
311	2200-2201	2200-2201
312	2201-2202	2201-2202
313	2202-2203	2202-2203
314	2203-2204	2203-2204
315	2204-2205	2204-2205
316	2205-2206	2205-2206
317	2206-2207	2206-2207
318	2207-2208	2207-2208
319	2208-2209	2208-2209
320	2209-2210	2209-2210
321	2210-2211	2210-2211
322	2211-2212	2211-2212
323	2212-2213	2212-2213
324	2213-2214	2213-2214
325	2214-2215	2214-2215
326	2215-2216	2215-2216
327	2216-2217	2216-2217
328	2217-2218	2217-2218

**In the Supreme Court of the United States**

**OCTOBER TERM, 1972**

**No. 71-1136**

**MURRAY TILLMAN, ET AL., PETITIONERS**

**v.**

**WHEATON-HAVEN RECREATION ASSOCIATION, INC.,  
ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

**OPINIONS BELOW**

The opinions of the court of appeals (Pet. App. B) are reported at 451 F. 2d 1211. The opinion of the district court (Pet. App. C) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on October 27, 1971. A petition for rehearing, with suggestion for rehearing *en banc*, was denied on December 16, 1971 (Pet. App. B). The petition for a writ of certiorari was filed on March 13, 1972, and was granted on May 15, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether membership in a community recreation facility, as an incident to the ownership or rental of real property located within a prescribed geographic area, is a property right within the meaning of 42 U.S.C. 1982 which may not be denied to a resident of the area, and the use of which may not be restricted, solely on the basis of race.

## STATUTES INVOLVED

Section 1982 of Title 42, United States Code provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Section 2000a(a) of Title 42, United States Code, provides:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.

Section 2000a(e) of Title 42, United States Code, provides in relevant part:

The provisions of this title shall not apply to a private club or other establishment not in fact open to the public.



# INTEREST OF THE UNITED STATES

The United States has a continuing interest in, and responsibility for, eradicating discriminatory practices which deny to members of any group, on account of their race, access to residential communities, to places of public accommodation or to community recreational facilities. This is especially applicable to practices which deny to individuals, on the basis of race, the same benefits that are accorded to their neighbors in the community in which they reside, thereby encouraging segregated housing arrangements. See Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982; Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a; and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* Our participation here is in accordance with the government's participation in such cases as *Palmer v. Thompson*, 403 U.S. 217; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; *Daniel v. Paul*, 395 U.S. 298; *Hunter v. Erickson*, 393 U.S. 385; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Boyd v. Virginia*, 364 U.S. 454; and *Shelley v. Kraemer*, 334 U.S. 1.

## STATEMENT

1. Petitioners are Negro and white homeowners in Silver Spring, Maryland, who reside within a three-quarter mile radius of the swimming pool operated by respondent Wheaton-Haven Recreation Associa-

tion, Inc. ("Wheaton-Haven").<sup>1</sup> They commenced this action for declaratory and injunctive relief, and for damages, in the United States District Court for the District of Maryland, claiming, *inter alia*, that the denial of pool membership to Negro residents of the area, and of pool privileges to Negro guests of white members, violates the provisions of the Civil Rights Act of 1866 by depriving them, solely on the basis of race, of a property interest protected by 42 U.S.C. 1982. Petitioners also claimed that Wheaton-Haven is a place of public accommodation within the meaning of Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)), and is not within the "private club" exemption (42 U.S.C. 2000a(e)) from that Act's requirement of non-discrimination.

The material facts are essentially set forth in the opinion of the court of appeals (Pet. App. B-2 to B-3). Wheaton-Haven, a non-profit Maryland corporation, was organized in 1958 for the purpose of operating a swimming pool in Silver Spring, Maryland. Use of the pool is limited to Wheaton-Haven members and their guests. Under the association's by-laws, membership is "open to 'bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool'" (Pet. App. B-2). The pool

<sup>1</sup> One of the Negro petitioners, Mrs. Rosner, is not a resident of the area, but is a friend of white petitioners, Mr. and Mrs. Tillman, who own a home in the area and are members of the Wheaton-Haven pool. Mrs. Rosner was not permitted to use the pool as the Tillmans' guest.

is financed by subscriptions for membership collected from residents within the prescribed area."

Membership in Wheaton-Haven is by family units rather than by individuals; it is limited to 325 families. Persons living outside the three-quarter-mile radius may, on the recommendation of a member, be accorded membership so long as outside members do not exceed 30 percent of the total Wheaton-Haven membership. All applicants must be approved "by an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose" (Pet. App. B-2). If a resident member—i.e., one who owns a home within the designated three-quarter-mile radius—sells his property and resigns his membership, the purchaser of his home has a first option to purchase the membership, subject to the approval of the Board of Directors.

Two of the petitioners, Dr. and Mrs. Harry C. Press, are Negroes who own a home within the three-quarter-mile radius of the pool. The person from whom they purchased the premises had not been a member of Wheaton-Haven. Dr. Press tried to apply for pool membership in the spring of 1968, but the association's Board of Directors refused to provide him a membership application. It was stipulated that the sole basis for this refusal was his race (Pet. App. B-3).

A Virginia building contractor constructed the pool, and associated machinery (i.e., pumps, a motor and a chlorine system) is used to operate it. There are snack vending machines around the sides of the pool. The facilities are in an enclosed area to which only the members and their guests are admitted (Pet. App. B-3).

Two other petitioners, Mr. and Mrs. Murray Tillman, are white members of Wheaton-Haven. In July 1968, they invited a Negro woman, petitioner Rosner, to the pool as their guest and she was admitted. On the following day, the association's Board of Directors held a special meeting and adopted a rule limiting guests to relatives of members. Thereafter, Mrs. Rosner was denied admission to the pool. It is undisputed that the sudden limitation on guest privileges was due principally to the initial admission to the pool of Mrs. Rosner as a guest of the Tillmans.<sup>1</sup>

2. The present action was commenced against Wheaton-Haven and its officers and directors, challenging under the Civil Rights Acts of 1866 and 1964 the association's refusal, solely on the basis of race, to extend to petitioners membership and guest privileges in the community swimming pool. The district court held (Pet. App. G) that Wheaton-Haven is exempt from the non-discrimination provisions of both statutes as a "private club" within the meaning of 42 U.S.C. 2000a (e), and thus that it can "engage in the admitted exclusion of Negro members and guests solely on racial grounds" (Pet. App. G-9). It granted the defendants' motion for summary judgment.

On appeal, a divided panel of the Fourth Circuit affirmed (Pet. App. B). The majority held that the procedures adopted by Wheaton-Haven for determining membership eligibility are sufficiently distinguish-

<sup>1</sup> At the annual meeting of the members of Wheaton-Haven in the fall of 1968, a resolution was adopted reaffirming the new guest policy. The need to reduce the number of guests using the pool was given as an additional justification (Pet. 5).



able from those in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, that *Sullivan* is not controlling here. The dispositive question, it concluded (Pet. App. B-5 to B-7), is whether Wheaton-Haven qualifies for the "private club" exemption from the requirement of non-discrimination in the Civil Rights Act of 1964, 42 U.S.C. 2000a. Finding that it did (Pet. App. B-17 to B-23), the court declined to consider whether "Wheaton-Haven's racial limitation on membership is forbidden by the 1866 Civil Rights Act \* \* \*" (Pet. App. B-5), since, in its view (Pet. App. B-6), the "[private club] exception [in the 1964 Act] to the ban on racial discrimination of necessity operates as an exception to the Act of 1866, in any case where that Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act."

The dissenting judge, while noting that "the details differ," was of the opinion that "this case is indistinguishable in all material aspects from *Sullivan* \* \* \*" (Pet. App. B-25). He concluded that the denial of membership and guest privileges to these petitioners solely on racial grounds was an impermissible deprivation of rights explicitly protected by 42 U.S.C. 1982. Moreover, he questioned "the pertinency of the claim that the Civil Rights Act of 1866 is circumscribed or limited by the Civil Rights Act of 1964" (Pet. App. B-27), since, in his view, "Wheaton-Haven is not a private club" (*ibid.*). A petition for rehearing and suggestion for rehearing *en banc* were denied, with two additional judges dissenting (Pet. App. B-30 to B-31). A *per curiam* opinion denied rehearing *en banc* (Pet. App. B-32).



## ARGUMENT

## INTRODUCTION AND SUMMARY

This case raises again the question whether 42 U.S.C. 1962 prohibits a corporate community recreational facility from discriminating on the basis of race with respect to member and guest privileges in a community swimming pool, access to which is available to all white residents as an incident of their ownership or rental of property within a stated geographic area. The Court responded affirmatively to this question in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, on facts that in our view are not substantially different from those involved here. For reasons to be stated, it seems to us to follow from *Sullivan* that, under Section 1962, Wheaton-Haven cannot in this case discriminatorily exclude Negroes from its membership.

The path leading to a proper resolution of the issue presented here has been well marked by prior decisions of this Court. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, the Court construed Section 1 of the Act of 1866 as reaching not only public, but also wholly private, racial discrimination with respect to the sale or rental of real estate. It held (392 U.S. at 436) "that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property." For, as the Court observed (392 U.S. at 443):

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to “go and come at pleasure” and to “buy and sell when they please”—would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

The *Jones* ruling necessarily applies to all transactions covered by 42 U.S.C. 1982, a provision which derives from Section 1 of the Civil Rights Act of 1866. See *Sullivan v. Little Hunting Park, Inc.*, *supra*, 396 U.S. at 237.<sup>4</sup> But whether that statutory protection bars

<sup>4</sup>Section 1 of the Civil Rights Act of 1866 (14 Stat. 27) read as follows:

“That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any

racial discrimination "in the provision of services or facilities in connection with the sale or rental of a dwelling" (392 U.S. at 413) remained an open question after *Jones*.\*

This Court provided the answer two years later in *Sullivan v. Little Hunting Park, Inc.*, *supra*. That case involved—as does this one—the denial on racial grounds of a membership interest in a community recreational association, the principal benefit from which was use of the neighborhood swimming pool open to white residents living within a stated geographic area. In *Sullivan*, a white resident of the area attempted to assign to his Negro tenant as part of the leasehold interest one of his two membership shares in the association; the assignment was not approved by the association's Board of Directors solely for racial reasons (396 U.S. at 234-235). This

law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The "property" clause became separated when the rest of the provision, slightly expanded and made applicable to resident aliens as well, was re-enacted in *hac verba* as Section 16 of the Enforcement Act of May 31, 1870 (16 Stat. 140, 144). The property guarantee remained available to citizens alone as part of the 1866 Act, the whole of which was re-enacted (by reference only) by Section 18 of the Enforcement Act of 1870. This division was formalized in the Revised Statutes of 1878, the "property clause" being codified as Section 1978, the rest as Section 1977, and persists today in Sections 1982 and 1981 of Title 42 of the United States Code.

\*The Court there stated in the margin (392 U.S. at 413-414, n. 10): " . . . we intimate no view upon the question whether ancillary services or facilities of this sort might in some situations constitute 'property' as that term is employed in § 1982 . . . ."

Court held that the Board's action violated 42 U.S.C. 1982, "whether the membership share be considered realty or personal property" (396 U.S. at 236). It was a clear interference with the Negro tenant's protected right under the statute "to . . . lease . . . property." Any narrower "construction of the language of § 1982 would," the Court concluded (396 U.S. at 237), "be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 . . ."

As the court below correctly stated (Pet. App. B-10), "*Sullivan* thus decided affirmatively a question expressly reserved in *Jones*—whether an incident to a transaction in which parties are protected from racial discrimination by § 1982 is similarly protected." In light of *Sullivan*, therefore, the issue in the present case is whether the acquisition of membership in Wheaton-Haven is an incident of a protected sale or lease of property.

In holding that it is not, the court of appeals unconvincingly distinguished the "resident" requirement for membership in Wheaton-Haven—i.e., "open to 'bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool'" (Pet. App. B-2)—from what it characterized as the homeowner (either by purchase or lease) requirement for membership in Little Hunting Park. The former, it stated (Pet. App. B-15), is not, as it assumed the latter to be, "unequivocally tied to the land"; it is, rather, "an area preference, and nothing more" (Pet. App. B-16).

Perhaps not itself persuaded that this formalistic

difference between resident membership and so-called homeowner membership provided a sufficient basis for declining to follow *Sullivan*, the court proceeded to stand this Court's analysis in *Sullivan* on its head. Instead of resolving the issue in terms of the protection afforded under Section 1982 of the 1866 Act, which, as recognized in *Sullivan* (396 U.S. at 237), was not in any way curtailed by the "public accommodations provision of the Civil Rights Act of 1964 \* \* \*," it ruled that the earlier statutory provision was "unavailable to the [petitioners] as a separate and independent basis for relief" (Pet. App. B-7). In its view, the question turned only on whether Wheaton-Haven was a covered establishment which was barred from discriminating under the 1964 Act. As it stated (*ibid.*): "If Wheaton-Haven is a private club as defined in the 1964 Act, the exemption contained in that Act is equally applicable to the earlier statutes." The conclusion that "[f]rom the standpoint of all the relevant factors taken as a whole, [the association] has demonstrated that it is private, within the meaning of the federal statute" (Pet. App. B-22), is, we submit, both legally and factually erroneous.

## II

RACIAL DISCRIMINATION WITH RESPECT TO MEMBERSHIP  
IN WHEATON-HAVEN RECREATION ASSOCIATION, INC.,  
VIOLATES SECTION 1 OF THE CIVIL RIGHTS ACT OF 1866  
AND IS NOT AUTHORIZED BY THE "PRIVATE CLUB" EX-  
CEPTION TO THE CIVIL RIGHTS ACT OF 1964

SECTION 1982 PROHIBITS RESPONDENTS' CONDUCT

Section 1982 of the Civil Rights Act of 1866 guarantees all citizens "the same right \* \* \* as is enjoyed



by white citizens \* \* \* to \* \* \* purchase, lease, sell, hold, and convey real \* \* \* property." [Emphasis added.] Implicit in that guarantee is the right to the same use and enjoyment of the property and all its incidents as a white citizen would receive. This includes access to recreation facilities available to all residents in a particular community as an incident of their ownership or rental of real property there. *Sullivan v. Little Hunting Park, Inc.*, *supra*. As underscored by this Court's decision in *Sullivan*, such community recreation facilities, especially swimming pools, are a major factor affecting the desirability and value of home acquisitions and rentals in a residential area. The discriminatory exclusion of Negroes therefrom would both discourage them from buying or leasing in the community and render any purchase or lease they did make a poorer bargain than that which a white citizen could obtain. "Solely because of their race, non-Caucasians [would] be unable to purchase, own and enjoy property on the same terms as Caucasians." *Barrows v. Jackson*, 346 U.S. 249, 254. There is no more room under Section 1982 for perpetuating neighborhood segregation by such indirect means than there is for direct racial discrimination in the sale or rental of real property.

After this Court's decision in *Jones*, *supra*, we think there can be no doubt that a developer who installs a recreational facility in a real estate development is barred by the property clause of the 1866 Act from selling or leasing property therein to whites with, and to Negroes without, access to the commu-

nity facility. On this point, the court below seems to agree (Pet. App. B-16); but it would go no farther, limiting the reach of the statute in areas not involving state action to the real estate developer, who, in the court's view, is alone forbidden from discriminating on the basis of race with respect to the use of the neighborhood swimming pool. This conclusion is, however, premised on a faulty characterization of the type of swimming facility to which *Sullivan* applies as one "of the sort of recreational facilities installed in modern real estate developments, which are included by the developers to enhance their sales of individual properties, and which are 'private' in the sense that they serve only those persons who purchase from the developers" (Pet. App. B-16).<sup>4</sup>

The Little Hunting Park pool was manifestly not part of a unified development plan. It was built and operated by a voluntary organization formed by an associated group of neighborhood residents who lived within a stated geographic area.<sup>5</sup> The difference is not without significance. In forbidding racial discrimination with respect to pool memberships in Little Hunting Park, Inc., the Court in *Sullivan* clearly recognized that Section 1982 is no less applicable because

<sup>4</sup> The suggestion by the court below (Pet. App. B-11, B-15, n. 16) that *Sullivan* turned largely on the fact that the membership policy there involved—supposedly based on property ownership rather than residency—"encouraged the development of absentee landlords dealing commercially in membership shares" is without foundation. Nothing in the *Sullivan* record indicates that such a practice existed; nor does this Court's opinion mention the possibility.

<sup>5</sup> See the Appendix in *Sullivan*, No. 55, October Term, 1969, pp. 24-28, 45.

the facilities are provided by a separate and ostensibly private membership corporation, to which belong only some of the residents of the community served; but which has as its only expressed standard for membership the applicant's residence in a specified geographic area.

It is agreed that that is precisely the corporate structure of the association under attack in the present case (Pet. App. B-16). In opening its membership to "bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool" (see p. 4 *supra*), Wheaton-Haven made access to the community facility it operates an incident to owning or leasing a home within a defined geographic circle. Without such a possessory or leasehold interest, a person does not qualify as a "bona fide resident"; with it, he is, without further qualification, recommendation or nomination, eligible for membership. And while his application requires the approval of the association's members or its Board of Directors, the record here shows that such approval was—as in *Sullivan*, where membership was also subject to Board approval (396 U.S. at 234)—essentially a mere formality; it had, but for this instance and one other,\* been routinely obtained. In short,

\* In Wheaton-Haven's 11-year history, only one white person had been rejected for membership by the Board; the record does not reveal the reason for this rejection (Pet. App. B-21). Similarly, in the 12-year history of Little Hunting Park, Inc., it, too, had rejected but one white applicant for membership (see the Appendix *Sullivan*, in No. 23, October Term 1963, p. 127). Although respondents' counsel suggested at oral argument in the court of appeals that white prospective members of Wheaton-Haven have in the past been "informally" re-

access to the pool is, for whites, simply an aspect of living in the area, subject only to paying for the privilege.

In such circumstances, exclusion from Wheaton-Haven membership of Negroes residing within a three-quarter-mile radius of the pool, admittedly for no reason other than race (see p. 5, *supra*), constitutes an obvious abridgment or dilution of the right to acquire a home. *Sullivan v. Little Hunting Park, Inc.*, *supra*. Petitioners Dr. and Mrs. Press were in effect told: You may buy or rent a house in the designated area, but you may not acquire the right to use the community facilities which are open to your white neighbors. To permit such a result is to break the statutory pledge to the Negro, embodied in Section 1982, that he shall enjoy "the same right \* \* \* as \* \* \* white citizens" (emphasis added). As this Court made clear in *Jones* (392 U.S. at 443) and reaffirmed in *Sullivan* (396 U.S. at 237), that pledge is not susceptible of a narrow construction that would preclude discrimination only in the actual sale or rental of the dwelling involved, allowing it to continue with reference to the incidents of ownership or possession. This was, indeed, the clear import of Senator Trumbull's speech of January 29, 1866, introducing the bill which later became the Civil Rights Act of 1866:

This measure is intended to give effect to that declaration [the Thirteenth Amendment] and  
 jected, the statement is in direct conflict with respondents' own answers to petitioners' interrogatories (see Pet. 13), and as the court below stated (Pet. App. B-21, n. 23), finds no support in the record of this case.

secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits. \* \* \*

It is, we submit, no answer to characterize the membership policy of Wheaton-Haven as "an area preference, and nothing more" (Pet. App. B-16), as did the court below. To be sure, the by-laws of the association permit a limited number of nonresidents, on the recommendation of a resident member, to become members of the community facility (see p. 5, *supra*). But so, too, did Little Hunting Park, Inc., accept a limited number of nonresident members.<sup>10</sup> That, however, does not alter the fact that those who are "bona fide residents" within a three-quarter-mile radius of the Wheaton-Haven pool can, if they are white and desire a membership, enjoy access to the community facility as an incident of owning or leasing a home nearby. Section 1982 requires that the "same right" be accorded to Negro residents similarly situated who wish to use the pool.

<sup>10</sup> Cong. Globe, 39th Cong., 1st Sess., p. 474, quoted in *Jones* at 392 U.S. 431-432; emphasis supplied.

<sup>11</sup> Under the Little Hunting Park by-laws, a person could—as in the present case—retain his membership after he moved away from the prescribed area. Moreover, if one owned real estate in the area but did not maintain a residence there, he was entitled to membership. And, at least 25 of the 133 nonresident members of Little Hunting Park apparently lived outside the area and owned no property within it at the time that they became members. See the Appendix in *Sullivan*, No. 33, October Term 1969, pp. 163-164, 221.



Any other result would not only deprive black citizens of benefits guaranteed by the statute as an incident of their "purchase" of property.<sup>11</sup> It also would deny them the added value that could otherwise be realized on a sale of their property if they were—like white resident members of Wheaton-Haven—in a position to transfer to the purchaser a first option to become a member (see p. 5, *supra*). Nor do we believe that this point can be brushed aside, as the court below tries to do (Pet. App. B-12 to B-13), on the ground that such an option is "a thing utterly without use or value" (Pet. App. B-13). To be sure, since it operates "to vault a resigning member's vendee over the heads of persons on the waiting list to receive immediate consideration for a newly vacated membership" (Pet. App. B-12), it is most valuable "when the membership rolls are full, and a waiting list exists" (*ibid.*). But that could well be the situation at the time Dr. and Mrs. Press decide to sell their property. Indeed, as the court below acknowledges (Pet. App. B-30), such was in fact the case "when Dr. Press first became interested in considering a possible application for membership"; a smaller membership list thereafter is no basis for declaring valueless an option to be transferred at some time in the future. As the dissent below observed (Pet. App. B-26): "Even

<sup>11</sup> As pointed out in the dissent below (Pet. App. B-26): "It is immaterial that a tenant claimed membership in Little Hunting Park under a lease, while Dr. and Mrs. Press base their claim on ownership of real property situated less than three-quarters of a mile from the pool. Section 1982 protects the rights to 'purchase' and 'hold' property no less than the right to 'lease.'"

though the present value of an option cannot be readily ascertained, a dollar in the hands of Dr. and Mrs. Press, in the language of *Jones v. Alfred H. Moyer Co.*, should be able to purchase at least the same thing as a dollar in the hands of their white neighbors. Section 1982 should not be construed to deny a bargain on the basis of race."

Moreover, even at present the right to transfer a first option, afforded by a Wheaton-Haven membership, is no more a "functional nullity", in the words of the court below (Pet. App. B-13), than was the right of assignment, afforded by membership in Little Hunting Park, that this Court found to be of some value in *Sullivan* (396 U.S. at 236-237). For, the tenant who received the assignment of membership in *Sullivan*—like the purchaser who would now receive a first option from a member of Wheaton-Haven, when the membership list is *not* full—was eligible in his own right as a lessee to acquire membership in Little Hunting Park, Inc., open to all adult persons who "*reside in or who own, or who have owned housing units*" (emphasis supplied).<sup>10</sup> He gained no particular advantage by virtue of the assignment, which was also subject to Board approval (see p. 15, *supra*). As the dissent below properly concluded (Pet. App. B-27):

Little Hunting Park's transfer by assignment and Wheaton-Haven's use of an option differ only in form, not substance. The congressional commitment to equal rights under the law

<sup>10</sup> See the Appendix in *Sullivan*, No. 33, October Term 1969, pp. 121-122.

manifested by the enactment of the Civil Rights Act of 1866 cannot be served by viewing this case as a simple exercise in the fine art of conveyancing. The case involves far more. It is an attempt to secure what the proponents of the Act envisioned and the Supreme Court has preserved—the “great fundamental rights” of all men, whatever their race or color” to “acquire” and “dispose” of property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 \* \* \*

Wholly apart from the transferable first option feature, however, the basic reality of the case inheres in the obvious fact that the sale or rental value of homes within the prescribed radius of Wheaton Haven is enhanced by the availability of access to the pool as an incident of residence in the area. If that access is denied blacks because of their race, they either will be outbid for properties in the area by whites who receive the enhanced value or they will have to pay for a greater value than they receive. As a result, racial segregation of the entire neighborhood would be fostered by a discrimination directly contrary to the purpose of Section 1982, which, as earlier noted, is “to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.” *Jones, supra*, 392 U.S. at 443. Any possible doubt which may have remained after *Jones* that Section 1982 forbids such a result in the present context was dispelled, as already shown, by this Court’s subsequent decision in *Sullivan*, which, we submit, the court of appeals should have followed here.

THE "PRIVATE CLUB" EXCEPTION TO THE CIVIL RIGHTS ACT OF  
1964 IS NOT APPLICABLE HERE

As we earlier indicated, the court below also held that any violation of Section 1982 here is excused because Wheaton-Haven's admittedly discriminatory membership policy is permissible under the "private club" exemption in the Civil Rights Act of 1964, 42 U.S.C. 2000a(e). But that provision cannot properly be invoked in this case, both because Wheaton-Haven is not, under the established criteria, a "private club," and because, even if it were, the 1964 exemption provision does not apply as a limitation on the non-discrimination requirement of Section 1982.

I. As we have shown, there is little to distinguish the Wheaton-Haven facility from the Little Hunting Park facility that this Court determined in *Sullivan* not to be "a private social club" (396 U.S. at 236). Here, as in that case, the only real membership standard expressed in the association's by-laws is that the applicant must reside within a stated geographic area.<sup>10</sup> Every adult owning or leasing a home within the prescribed area is eligible, without more, to become a member. Approval by the membership or by

<sup>10</sup> While a limited number of persons residing outside that area could, on a member's recommendation, become eligible for membership, the same arrangement existed with respect to Little Hunting Park (see *supra*, p. 17, n. 10). Since nonresident-members could not exceed 30 percent of the full Wheaton-Haven membership—including those families who had once been resident members and moved from the area, but retained their membership as nonresidents—this feature of Wheaton-Haven's membership policy should no more be considered a basis for sustaining the claim of privacy than was the similar nonresident membership policy of Little Hunting Park, Inc.



the association's Board of Directors—which was also a requirement for membership in Little Hunting Park—is routinely given to whites (see n. 8, *supra*). There is, in short, no more “a plan or purpose of exclusiveness” (396 U.S. at 236) here than there was in *Sullivan*. What this Court said of the neighborhood association involved in that case has equal application here (*ibid.*): “It is open to every white person within the geographic area, there being no selective element other than race. See *Daniel v. Paul*, 395 U.S. 296, 301-302. What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in *Shelley v. Kraemer*, 334 U.S. 1, by reason of the Fourteenth Amendment.”

We agree with the dissent below (Pet. App. B-28) that a facility such as the one involved here should not be characterized as “private when its membership is so closely tied to real estate bought and sold on the open market.” Such is the teaching of *Daniel v. Paul*, 395 U.S. 296. The “club” involved there was a large one, serving people from miles around; visitors purchased a low-cost “membership” each season and also paid to use certain facilities on each visit; such memberships were routinely issued to all whites who sought them, but refused to Negroes. Wheaton-Haven is much smaller, in size, intended for the use and enjoyment of a limited number of families in a smaller geographic area; the initial membership fee is high and yearly fees are assessed so that it may meet expenses. But the administration of its membership policies—much the same as with Little Hunting Park—precisely



tracks that which characterized *Daniel v. Paul*: subject to the availability of memberships, any white adult living in the community could join; Negroes could not.

Just as in *Daniel v. Paul*, such a policy does not justify characterization of the facility as a private club. "Membership" which is based essentially on the geography of residence, and is readily transferable by an area homeowner through use of a first option at the time he sells his home (see pp. 18-20, *supra*), is the very antithesis of the private social club. See *Nesmith v. YMCA of Raleigh, N.C.*, 397 F. 2d 96, 102 (C.A. 4); and see *United States v. Richberg*, 398 F. 2d 523 (C.A. 5); *Rockefeller Center Luncheon Club, Inc. v. Johnson*, 131 F. Supp. 703 (S.D.N.Y.); *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753 (D. Md.). The well established hallmarks of privacy are missing: membership is not even personal to any individual; nor is any attempt made to achieve any sort of compatibility of background or interest, save geography. See *Daniel v. Paul*, *supra*, 395 U.S. at 301-302; *Sullivan v. Little Hunting Park, Inc.*, *supra*.

2. At all events, this Court in *Sullivan* (396 U.S. at 237) expressly rejected "the suggestion that the public accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act." "A comparable argument, pre-

"The new law and the old are substantially different. For example, Title II of the 1964 Act prohibits discrimination on the basis of "race, color, religion, or national origin" (Section 201(a)), while the 1866 Act presumably applies only to race or color discrimination. Although the 1866 Act, on its face, prohibits all racially motivated denials of the rights it protects,

mised on an interpretation of the Fair Housing Title of the Civil Rights Act of 1968 (42 U.S.C. 3601, et seq.) as repealing or qualifying the "property" provision of the 1866 statute, was similarly rejected in *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 413-417. And the courts of appeals have, but for the decision below, consistently declined to interpret subsequent civil rights legislation as impairing the sanction of Section 1 of the 1866 Act. See *Sanders v. Dobbs Houses, Inc.*, 431 F. 2d 1097 (C.A. 5) (specific remedies of Title VII of the 1964 Act do not preempt general remedial language of 42 U.S.C. 1981); *Young v. International Telephone & Telegraph Co.*, 438 F. 2d 757 (C.A. 3) (Title VII of 1964 Act does not impose jurisdictional barrier to suit under 1866 Act); *Caldwell v. National Brewing Co.*, 443 F. 2d 1044 (C.A. 5), certiorari denied, 405 U.S. 916 (same).

Moreover, Title II of the 1964 Act itself expressly preserves pre-existing rights under Federal law in the following terms (Section 207(b) of the Act, 42 U.S.C. 2000a-6(b)):

Title II applies only to certain types of establishments having some nexus with interstate commerce (Sections 201(b), 201(c)). The 1866 Act is couched in declaratory terms, without reference to any particular mode of enforcement, whereas Title II embodies a specific remedy provision (Section 204(a)). The new law—unlike the old—expressly provides for enforcement at the instance of the Attorney General (Section 206), and the 1964 Act also created a Community Relations Service to assist in the private settlement of disputes relating to discriminatory practices (Title X, Sections 1001a-1004, 42 U.S.C. 2000g-2000g-3) to which the courts may refer cases brought under Title II for the purpose of achieving voluntary compliance. Compare *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 417.

\* \* \* [N]othing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

It will be noted that only rights under laws "not inconsistent" with Title II remain enforceable. To the extent, however, that the 1866 Act prohibits racial discrimination by establishments which are not covered by Title II, it is not "inconsistent" with the 1964 Act in the ordinary sense that it contradicts the basic purpose of the new law (see *Sullivan v. Little Hunting Park, Inc.*, *supra*, 396 U.S. at 238); it obviously is designed to vindicate basically similar and partially identical rights. See *United States v. Johnson*, 390 U.S. 563, 566.

There are of course many possible explanations for the limitations of the 1964 Act. Some were merely responsive to the Commerce Clause approach of the legislation and then prevailing constitutional doubts concerning the scope of congressional power under the Thirteenth and Fourteenth Amendments. Most likely, the full reach of the 1866 Act in this area was not then appreciated.<sup>12</sup> But it does not follow that

<sup>12</sup> 42 U.S.C. 1981 and 1982 were briefly noted in the hearings on the 1964 Civil Rights Act as at least prohibiting state-sanctioned discrimination in places of public accommodation (Hearings on S. 1732 before Senate Committee on Commerce, 88th Cong., 1st Sess., p. 134 (Senator Prouty and Attorney General Kennedy)). It does not appear, however, that Con-

any part of it was repealed *sub silentio* by the 1964 Act. On the contrary, the savings clause quoted above expressly preserves preexisting rights under federal law, and that provision is of course to be honored whether or not the reach of the 1866 Act was then fully recognized. See *Sullivan v. Little Hunting Park, Inc.*, *supra*, 396 U.S. at 237-238.

Accordingly, as this Court confirmed in *Sullivan*, the 1866 Act stands unimpaired. For the reasons elaborated above, Wheaton-Haven's refusal to approve Dr. and Mrs. Press' membership application as residents within the prescribed geographic area should be held to be violative of Section 1 of that statute, 42 U.S.C. 1982. The statutory right to purchase or lease cannot be fully meaningful unless the statute also reaches the conduct of those who have it within their power to prevent the Negro from enjoying the rights transferred. That Section 1982 does reach that conduct was the essence of this Court's holding in *Sullivan*. And, since the facts here are virtually identical in all material respects to those in *Sullivan*, the same result goes understood those infrequently-used statutes to have the reach which has been confirmed by this Court's construction in *Jones*.

Of course, the understanding of the legislators in 1964 as to the intent of their predecessors a century earlier is only very remotely relevant. Accordingly, just as the Court did not look to the drafters of the Fair Housing Law of 1968 to determine the scope of the 1866 Act with reference to the issue before it in *Jones*, here the Court's application of Section 1982 should not be affected by the views that can be ascertained on this subject in the 88th Congress.



violating the complainants' statutory rights should follow."

#### CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded

"Once it is recognized that under Section 1982 Negro residents of the area cannot be denied membership in Wheaton-Haven on racial grounds, it follows that racial discrimination in the pool's guest policy must also fail. Otherwise, Negro members would be placed in a disfavored racial category which would make them second-class members of the pool community and thus deprive them of the full enjoyment of their property rights. Compare the complaint of the incumbent Negro tenant in *Traficante v. Metropolitan Life Ins. Co.*, No. 71-708, certiorari granted, February 22, 1972.

With this addition to its analysis, we agree with the dissent below (Pet. App. B-29): "Unquestionably Wheaton-Haven can limit the number of guests a member can bring. Similarly, it can refuse to admit guests, regardless of race, who, because of their demeanor or age would unduly burden the use of the pool. But otherwise valid limitations cannot be couched directly or indirectly to restrict the race of guests. The [Wheaton-Haven] membership is a valuable property right, an incident of which is the right to invite guests. The right would be empty indeed unless the guests have the right to accept. Racial restrictions on the right to invite guests, and to accept invitations, are racial restrictions on the right to hold property that violate § 1982. A white host can vindicate this right. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969). Cf. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 \* \* \*."



to the district court for the entry of an order granting appropriate relief.

Respectfully submitted,

**ERWIN N. GRISWOLD,**

*Solicitor General*

**DAVID L. NORMAN,**

*Assistant Attorney General*

**LAWRENCE G. WALLACE,**

*Deputy Solicitor General*

**WM. BRADFORD REYNOLDS,**

*Assistant to the Solicitor General*

**JOHN C. HOYLE,**

*Attorney*

**JULY 1972.**

## TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
CONCLUSION .....	18

## TABLE OF CITATIONS

### Cases

Adickes v. Kress, 398 U.S. 144 .....	2
Ball v. Maryland, 378 U.S. 226 .....	10
Daniel v. Paul, 395 U.S. 298 .....	8
Evans v. Newton, 382 U.S. 296 .....	10
James v. Mayer, 396 U.S. 409 .....	7
Loose Lodge No. 107 v. Irvis, 32 L. Ed. 2d 627 .....	2, 10, 16
Rockville Fuel and Feed v. Board of Appeals, 257 Md. 183 .....	14
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 .....	3, 4, 7

### Statutes

#### U.S.C.:

Section 1981 .....	1, 3
Section 1982 .....	1, 3, 7
Section 1983 .....	2, 7
Section 2000a .....	1, 2, 7, 17

	PAGE
Section 2000a(b) .....	8
Section 2000a(c) .....	8
Section 2000a(e) .....	3
<b>Montgomery County Maryland Code (1965):</b>	
Section 111-2 .....	13, 14
Section 111-27 .....	13
Section 111-35(a) (2) .....	14
Section 111-37 .....	15
<b>Annotated Code of Maryland; Vol. 7, 1969 Replace- ment Vol.:</b>	
<b>Article 81—</b>	
Section 288(d) (8) .....	13
Section 288(d) (5) .....	13

IN THE  
**Supreme Court of the United States**

---

OCTOBER TERM, 1971

---

No. 71-1136

---

MURRAY TILLMAN, ET AL.,

*Petitioners,*

v.

WHEATON-HAVEN RECREATION  
ASSOCIATION, INC., ET AL.,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

---

**BRIEF OF RESPONDENTS**

---

The Respondents, with the exception of Richard E. McIntyre, separately represented by counsel, respectfully pray that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

**QUESTION PRESENTED**

Are 42 U.S.C. Secs. 1981, 1982 and 2000a applicable to the Wheaton-Haven Recreation Association, Inc., a distinctly private club, whose memberships are not tied to home ownership?

### STATEMENT OF THE CASE

This proceeding, as it now appears before this Honorable Court, is but a distant cousin of the suit as filed in the District Court of Maryland, on October 13, 1969. The original complaint laid heavy stress on the alleged involvement of Montgomery County, Maryland, in the Wheaton-Haven operation, under 42 U.S.C. Sec. 1983, and the claimed public character, of the pool corporation, under 42 U.S.C. Sec. 2000a. The roar raised under 1983 was reduced to a whimper, by the time the case was argued, in the District Court, on June 24, 1970, since *Adickes v. Kress*, 398 U.S. 144, defining state action, clearly emasculated the Petitioners' position under this Statute. The recent decision in *Moose Lodge No. 107 v. Irvis, et al.*, 32 L. Ed. 2d 627, decided June 12, 1972, completely silenced this whimper and appears to have resulted in abandonment of the state action concept. The thrust, under 2000a, was reduced to a parry, by the Court of Appeals, and does not appear to be seriously argued. At the Appellate stage, the Petitioners almost completely shifted their emphasis to Sections 1981 and 1982. This shift was occasioned by the decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, decided December 15, 1969, following the filing of this action. The Petitioners, although still vaguely alluding to interstate commerce, and public vis a vis private, now seem to substantially rely on the contention that Wheaton-Haven and Little Hunting Park are indistinguishable. The undisputed facts, and the well reasoned Opinion of the Fourth Circuit Court of Appeals, which held this case sub curia for over one year, belie such a conclusion.



### SUMMARY OF ARGUMENT

Wheaton-Haven Recreation Association, Inc. is a distinctly private organization falling within the statutory exemption of 42 U.S.C. Sec. 2000a(e). Although it may presently draw members from anywhere in the United States, and although it is situated in an area populated by several million persons within a radius of twenty miles, its membership is in the range of two hundred sixty out of an authorized maximum of three hundred twenty-five. It is not operated for profit, and meets its expenses from initiation fees, and annual dues, calculated on yearly cost of operation. It has a high degree of membership control, in that members elect the Board of Directors, may vote in new members, may amend the By-laws, and propose new business. It limits its facilities to members and relatives of members, engages in no publicity, and erected its own facilities, on its own land, with its own funds, and without public contributions or assistance.

The Civil Rights Act of 1866 (42 U.S.C. Secs. 1981, 1982), does not apply to Wheaton-Haven, since home ownership is not tied to pool membership. Members do not have the right to assign or sell a membership, nor is there any situation in which a contractual arrangement could arise between any member, and a person desirous of purchasing that membership. All new members must be approved by the Board of Directors, or the membership, as the case may be, and, as the situation presently exists, Wheaton-Haven may or may not repurchase the membership of a resigning member, at a discounted rate, as it sees fit.

The alleged tax exemptions granted to Wheaton-Haven are manifestly no different than those granted to any other non-profit, private organization, and the Petitioners do not

seem to argue that such exemption is sufficient to constitute state action.

In summation, this case has resolved itself down to the single and sole issue as to whether or not there are sufficient factual differences to distinguish Wheaton-Haven from the corporation in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229.

### ARGUMENT

THE CIVIL RIGHTS ACTS OF 1866 (42 U.S.C. SECS. 1981 AND 1982) AND OF 1964 (42 U.S.C. SEC. 2000a) DO NOT APPLY TO WHEATON-HAVEN.

The Respondents represent unto this Honorable Court that the organization, structure, and operation of Wheaton-Haven, in light of the facts which gave rise to this case, patently distinguish this appeal from *Sullivan v. Little Hunting Park, Inc.*, *supra*.

At the outset the Respondents take issue with the allegation in Petitioners' Brief (p. 5) that "If a member who was also a home owner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors". The structure of Wheaton-Haven allows of no situation where a contractual agreement could arise between a house selling member and a prospective purchaser of the home, allowing the seller to assign his membership.

The applicable provision of the Wheaton-Haven By-laws (Art. VI, A. 47), to use the language of the Fourth Circuit Court of Appeals, "Is a thing utterly without use or value and, as such, is a functional nullity. It is far too tenuous a thread to support a conclusion that there is a transfer of membership incident to the purchase of property" (Pet.

App. B-13). The structure of the Little Hunting Park pool corporation tied home ownership to pool membership, allowed persons who owned more than one home to purchase more than one membership, and gave such persons the right to assign memberships along with disposition of property. The relevant provisions of the Little Hunting Park By-laws bear no resemblance to those of Wheaton-Haven (A. 66):

"Section 5. Memberships may be transferred, or assigned, for temporary use, as follows:

a. Permanent transfer to another eligible person may be effected.

b. The use of the membership may be temporarily assigned to eligible persons for periods not to exceed one year. Re-assignment to such eligible persons is permissible.

c. Transfers and assignments of memberships must be by written instrument in such form as prescribed by the Board of Directors and are subject to approval by the Board."

As noted by the Fourth Circuit Court of Appeals (B. 13):

"It is difficult to understand how the argument on this point would benefit the Plaintiffs in any event. The person from whom Dr. Press purchased his home was not a member of Wheaton-Haven, and Dr. Press acquired nothing connected with Wheaton-Haven by his purchase. Were the situation presented where a Negro had purchased a home from a resigning member and been refused consideration for membership we might have a different case. Here there is no transaction of which Dr. Press could have acquired a specific right which, were he white, would have carried with it some embryonic interest in Wheaton-Haven".

The relevant provisions of the Wheaton-Haven By-laws require a selling member to forward a written resignation to the Association, which must purchase the membership

back at Ninety Percent (90%) of the initiation fee, IF THE ASSOCIATION HAS A WAITING LIST. If there is no waiting list, which has been the situation with Wheaton-Haven, except for a very brief period, the Board of Directors, may AT ITS OPTION, repurchase the membership for Eighty Percent (80%) of the initiation fee. If the corporation, in its sole discretion, elects to purchase the membership, the purchaser of the home, who makes a formal written application for membership, within a reasonable period, shall have the first option to purchase the membership of the seller, subject to the approval of the Board of Directors. If such repurchase and resale are accomplished, the new member pays the same initiation fee as any person applying through the normal channels, and does not benefit from the discounted price paid the former member. When the membership is not full, this "option" is in reality a word without meaning, since there is no geographic area in which prospective members must reside (Art. V, Sec. 3 By-laws, A. 46), and home ownership is not a condition of pool membership (Art. III, Sec. 1, By-laws, A. 43). When the pool membership is filled, this "option" does nothing more than advance the prospective member on the waiting list, but, in all events, the Board of Directors, or a majority of members, at a regular or special meeting, must approve the applicant. The first option of the home purchaser is not created until there has been a repurchase by Wheaton-Haven. Although the Petitioners attempt to create a right to membership out of this pure expectancy, this provision of the Wheaton-Haven By-laws played no part in the development of this case, since Press makes no contention that he was denied the right to purchase the membership of a former member. He simply asks the Court to rule that he is entitled to purchase a membership and elevate him to a status above all members of other minority groups.

Since the acquisition of membership in Wheaton-Haven is in no way an incident of a protected sale or lease of property, Petitioners' arguments under *Jones v. Mayer*, 392 U.S. 409, *Sullivan v. Little Hunting Park, supra*, and indeed Sec. 1982 must fail. Since admission to membership in Wheaton-Haven is not incident to any contract other than the membership agreement itself, if it is not incident to a contract for the sale or lease of property, Petitioners' arguments under Sec. 1981 are likewise untenable (Court of Appeals Opinion, B. 10).

The contention that 42 U.S.C. 2000a applies is a specious argument in that it was barely argued before the District Court, and literally unmentioned in the Court of Appeals.

The Respondents have provided this Honorable Court with the transcript of proceedings in the District Court, of June 24, 1970, at which time stipulations were made, and the issues defined. The Petitioners have consistently refused to include this transcript in the record, blatantly ignoring the Federal Rules of Appellate Procedure, even to the point when the Respondents designated this transcript to be included in the single appendix. This designation having been met with the response that the transcript was not available, reference is hereby made to stipulations of counsel for the Petitioners, from the transcript provided, by Respondents:

"But, of course, the question of whether it's a private club, we will also concede for this — for any purposes, would — is also relevant both to Sec. 2000 as well as Secs. 1981 and 1982, we don't think it is a private club, but if it is a private club, then neither 1981, 1982, or 2000 would apply" (T. 18).

"We're not pressing 1983. We've cited the state action concept in 2000 only as a secondary or alternative argument" (T. 23).



"Now going on then to Sec. 2000 or the Civil Rights Act of 1964, actually, the only issue is whether there is a link between the Association and interstate commerce" (T. 61).

"Although we had not shown it yet in the evidence, it is undoubtedly true also that this pool must use certain ingredients, chemicals, and other maintenance supplies which would still — which would also originate out of the state, but for purposes of the argument today, we don't have that information available, so we're relying on the pumps and equipment, and other components, which went into the establishment and building of the pool" (T. 62).

Although the Respondents do not concede that the Wheaton-Haven pool is "a place of exhibition or entertainment", as contemplated by Sec. 2000(a)(b), and argued by Petitioners (p. 27), the additional requirement of Sec. 2000(a)(c) that it customarily presents films, performances, and athletic teams, exhibitions, or other sources of entertainment, which move in commerce, bars recovery under this Statute. *Daniel v. Paul*, 395 U.S. 298, relied upon by Petitioners in their attempt to bring Wheaton-Haven within the interstate commerce provision of Sec. 2000a(c), involved an obvious sham, as do so many of the cases under 2000a. The owners therein adopted a system of membership fees and cards after the enactment of the Civil Rights Act of 1964, with Negroes being uniformly denied membership cards and admission. A snack bar was operated wherein the owners offered to serve out of state persons by advertising their facilities, on radio and in newspapers, and served approximately 100,000 patrons per year. In addition, a jukebox was used which regularly played records manufactured outside the state. Nothing in the Wheaton-Haven record indicates that there are customary sources of entertainment which move in commerce.

In addition the private club exemption of Sec. 2000a(c) applies.

From the very beginning of its corporate existence, the facts admit of no conclusion other than that Wheaton-Haven was formed as a legitimate private club, and was not organized as a sham, to avoid the operation of any Statute. The record reveals that, in 1958, a group of private citizens purchased a parcel of land, with their own funds, and formed a non-profit corporation. Members pay an initiation fee, when they are voted in as members, and are assessed an annual amount to cover the cost of pool operation, depending on the cost in that year. The original incorporators were motivated by a common associational interest in building a swimming pool for their own use.

"The purpose of the Association shall be to own, construct, develop, operate, maintain and manage suitable facilities for the safe and healthful recreation of the Association's members, said facilities to include a swimming pool, and such other facilities as the Association may deem desirable" (By-laws, Art. II, A. 42).

Membership is not limited to home owners (Art. III, A. 43), and, for all practical purposes, is not limited to any specific geographical area. At any regular meeting, a majority of the members, by an affirmative vote, may elect a person to membership, or, such membership may be obtained through the Board of Directors (Art. III, A. 43). Ten Percent (10%) of the members constitute a quorum (Art. IX, A. 48), so that as few as thirty-three (33) members may vote on new members, in a given situation.

The capacity of the pool is limited to three hundred twenty-five (325) family units and relatives of members (Art. III, Sec. 7, A. 46). The corporation is controlled by its members, in that an annual meeting is required, with at

least twenty (20) days notice to each member. The members may nominate Directors from the floor, and may bring business before the meeting, provided sufficient advance notice is given to the Board. Special meetings may be called, upon request of Twenty Percent (20%) of the members (Art. IX, A. 48). Amendment of the By-laws (Art. XV, A. 58), may be accomplished by the members, or the Board of Directors, subject to the final approval of the members. It is completely undisputed that Wheaton-Haven is a non-profit organization, and operated solely for the benefit of its members. It engages in no publicity whatsoever, and only maintains a sign, on its own premises, as a convenience to its members, giving the number where information may be obtained.

The Respondents therefore submit that they have the Constitutional right to fashion their private lives by joining such clubs and groups as they choose, to select their social intimates and business partners, solely on the basis of personal prejudices, including race, with the Constitutional protection against the imposition of social equality, having been consistently recognized by this Honorable Court. *Evans v. Newton*, 382 U.S. 296; *Bell v. Maryland*, 378 U.S. 226. This doctrine was reaffirmed by the dissent in the Moose Lodge No. 107 case:

"The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only caucasians to join or come as guests is Constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race."

Indeed, counsel for the Petitioners, in his argument, does not have the support of members of his own faction, as reported in the *Washington Post* of June 14, 1972:

"The top lawyer in Washington's American Civil Liberties Union Chapter, Ralph Temple, said yesterday that he approves of Monday's Supreme Court ruling that a genuinely private social club may practice racial discrimination although it has accepted a state liquor license. He said there are sharp differences on the issue among civil libertarians. The right of a private group not to be punished because they enjoy their right of private associations must be upheld, Temple, the local Chapter's counsel said in a telephone interview. . . . Temple said he thinks that if an organization that is a truly private group and not just a front is prevented from discriminating, this same legal weapon could be used against truly private black groups as well, preventing them from discriminating against whites. There is a fine line between that which is public and that which is truly, truly, private, said Temple. . . . Allison Brown, a private local attorney, who is handling the Wheaton-Haven case for the A.C.L.U., said that A.C.L.U. is depending on a 1969 Supreme Court ruling that the club in question was not truly private and, therefore, could not discriminate because it had no criteria of exclusiveness other than race. Brown added that he disagrees sharply with Temple's approval of Monday's Supreme Court decision, believing instead that the Court should have denied the Moose Lodge's Liquor license if it discriminates."

The Petitioners attempt to lay great emphasis on the fact that the formal records of Wheaton-Haven show only one rejection of a white applicant since the formation of the corporation, and conclude therefore that it lacks exclusiveness. This contention ignores the colloquy between the District Court and counsel for both parties, contained

throughout the District Court transcript, unchallenged by the Petitioners, and alluding to the subtle means by which private clubs admit members. The formal rejection rate is not a true mirror of the admissions policies of a private club, as was stated in the Opinion of the Court of Appeals (B. 21):

"This low rejection rate is in connection with formal applications only. At oral argument we were told by counsel for the Defendants that there have been numerous occasions in the past when a white prospective member would be rejected after informal interview and not given an application for membership. This would not show in the club's records as a rejection, but it would have the same effect. This information is not in the record, but *the Plaintiffs have not suggested that it is not an inaccurate representation*. It is typical of the manner in which private clubs often screen prospective members. Very often the actual application for membership is strictly a formality, for the club's decision will have already been made. Dr. Press, of course, was rejected in exactly this manner. Because he was never allowed to make a formal application for membership, he would not appear on Wheaton-Haven's books as having been rejected, despite the fact that we know he was."

Montgomery County, Maryland, now enters the fray and makes representations of fact found nowhere in the record. It alludes to favored tax statute, as it did in the Court of Appeals (p. 16). Challenged by the Court to produce some evidence that Wheaton-Haven enjoys a tax advantage not enjoyed by all private clubs, the County later filed a Memorandum contained in the record, indicating that "We have been unable to discover the cases of administrative opinions requested by the Court which either support or reject the position stated herein." Its contention was specifically rejected by the Court of Appeals (B. 19):



"This contention finds no support in Maryland law. Wheaton-Haven's exemption from state income taxes is derived from Md. Code, Art. 81, Sec. 288(d)(8), specifically exempting community swimming pools. In the same section, Sec. 288(d)(5), religious, educational, charitable, social, fraternal and other similar corporations, a category which, so far as we can determine, includes almost every kind of private club, are granted the identical tax exemption."

Nothing in the record indicates that Wheaton-Haven even represented that it intended to serve the community as a whole, nor do the stipulated facts reveal that this small group of private citizens ever had such motivation. The fact that Wheaton-Haven is labeled as a "community pool" by the zoning ordinance adds no stature to the County's argument. In order to construct a swimming pool, anywhere in Montgomery County, Maryland, other than a pool in the backyard of a residence, a special exception must be obtained from the Montgomery County Board of Appeals. The applicant must prove, pursuant to Section 111-37 of the Montgomery County Code, by a preponderance of the evidence, that such use will not affect adversely the present character or future development of the surrounding residential community, that certain specific setbacks are met, that a public water supply shall be available or that use of a private water supply will not affect adversely the water supply of the community, that certain screening requirements are met, that one parking space is provided for every seven persons lawfully permitted in the pool at one time (Sec. 111-27), and that special conditions may be added for the general welfare of the community, such as additional parking, additional fencing or screening, additional setbacks, location and arrangement of lighting, and a showing of financial responsibility. Once the re-

quirements are met, a property owner has a prima facie right to enjoy a special exception. If there is no probative evidence of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious, and illegal. *Rockville Fuel and Feed v. Board of Appeals*, 257 Md. 183. Wheaton-Haven met its burden, at a public hearing, and its special exception was granted on September 23, 1958, without qualification, and is presumed to be valid and correct. *Rockville Fuel and Feed v. Board of Appeals*, *supra*. Although the Petitioners attempt to classify the required zoning as a continuing privilege afforded by Montgomery County, Maryland, which it doles out on a permissive basis, the obvious purpose of the special exception is to protect the community, as a whole, from the adverse effects which at times result from outdoor swimming pools. An examination of the Montgomery County Code (Sec. 111-37) indicates that special exceptions must be obtained for a wide variety of uses ranging from abattoirs, airports, private rescue squads, animal hospitals, gas stations, boarding houses and cemeteries, to milk plants, funeral parlors, hospitals, nursing homes, rifle ranges, gravel pits, incinerators, and sawmills. Among other things, the applicant for such special exception must show that the proposed use will not affect adversely the health and safety of residents or workers in the area and will not be detrimental to the use or development of adjacent properties or the general neighborhood (Sec. 111-35(a)(2) Code). It is therefore clear that the special exception device is but another regulatory tool of zoning, rather than a cooperative venture between Montgomery County and a handfull of its citizens to provide a public facility at private expense. No representation was ever made by Wheaton-Haven, nor does the record in any way imply that the pool was constructed

to serve the general public. To the contrary, the very definition of community pool, as set forth in Section 111-2 of the Montgomery County Code compels privacy:

*"Swimming Pool, Community.* A swimming pool or wading pool, including buildings necessary or incidental thereto, operated by members of more than ten families for the benefit of such group and not open to the general public, whether incorporated or unincorporated, whether organized as a club or cooperative or association; provided that it is not organized for profit and that the right to use such pool is restricted to such families and their guests."

The definition of community swimming pools is entirely compatible with the definition of private club, also set forth in Section 111-2, Montgomery County Code:

*"Private Club.* An incorporated or unincorporated association for civic, social, cultural, religious, literary, political, recreational, or like activities, operated for the benefit of its members and not open to the general public."

The two uses are basically the same, as to organization, operation, member control, and lack of profit motive, but differ in that community swimming pools must meet stringent requirements, not required of private clubs, for the protection of the general neighborhood. A private club thus may not construct a pool without a separate special exception, under the zoning ordinance.

The other relevant definitions, as to pools, set forth in Section 111-2 are as follows:

*"Swimming Pool, Commercial.* A swimming pool or wading pool, including buildings necessary or incidental thereto, open to the general public and operated for profit."

**"Swimming Pool, Private.** A swimming pool owned by members of not more than ten families and used by no other than members of such families and their guests."

The fact that the Wheaton-Haven pool happens to have been constructed in a residential area does not alter the distinctly private character of its operation. If Wheaton-Haven were to have purchased a five hundred acre tract of land, in the sparsely populated upper county, it would still have been required to obtain a community swimming pool special exception from the Montgomery County Board of Appeals. If there are more than ten members in the club, a swimming pool is categorized, by the zoning ordinance as either commercial or community. The Respondents suggest that, with the affluence of Montgomery County, and with its prolific spending policies, public swimming facilities are the function of government. Should such facilities be deemed a public necessity, as Montgomery County would have the Court believe, the County has the burden to meet such demand. The contention that the Respondent corporation exists at the pleasure of the County and only to serve the public need is an argument bearing overtones of a collectivistic nature which fails to grasp the principles of privacy recently reaffirmed in *Moose Lodge v. Irvis, et al., supra*. Should this position be upheld, no group of more than ten members could, by any means, form a distinctly private club for the operation of a swimming pool, in Montgomery County. The argument presupposes that all pool clubs, with over ten members, are public.

Even more illusory are the references made by various hearings before an administrative body, known as the Montgomery County Commission on Human Relations.

Ignored is the Opinion of the Honorable Irving A. Levine, Judge of the Circuit Court for Montgomery County, Maryland, dated September 12, 1969, holding Ordinance 4-120, which created the said Commission, and established its authority, as void and unenforceable (A. 62). It should be noted that, at the time of the hearing before this rump body, on April 24, 1969, certain of the Respondents appeared, through counsel, challenged the jurisdiction of the Commission, and requested that the proceedings be suspended pending the outcome of the litigation which resulted in the Opinion of Judge Levine, *supra*. Rejecting this legitimate request, an *ex parte* hearing was held, resulting in false findings of fact which conflict with those subjected to judicial scrutiny. It is notable that, although these proceedings are apparently the gravaman of the County's position, it makes no reference to the demise of the Ordinance, nor does it attempt to legitimize the proceedings. It seems that the County would have this Honorable Court rule Wheaton-Haven to be a public accommodation under 42 U.S.C. Sec. 2000a and thus elevate the findings of fact before this lay body to a status preferred over the facts stipulated by counsel; and adopted in both lower Courts. Its position therefore directly clashes with that of the Petitioners, by reason of counsel's statement in the District Court that the only issue under 2000a is whether there is a link between the Association and interstate commerce (*supra*).

Lastly, the position of Montgomery County, in this case, becomes even more factitious in view of the Rosner claim. She simply complains that her birthright compels her admission to the pool as a guest, when the uniformly applied By-laws limit guests to relatives of members. Although white persons living near the pool cannot be guests unless



related to members, Rosner, who lives several miles away, is to be afforded exemption from this requirement because of her color. In the final analysis, although the Petitioners attempt to raise the guest issue, there is no practical difference between the Rosner and Press claims. When queried by the District Court, as to her situation, counsel replied (T. 88):

"Well, she would be, the same as the Presses today, I would assume. They're accepting memberships from people outside the three-quarter mile area and if she and her husband should apply, I assume, it would be the same as the Presses."

"(The Court) Does anybody have a contract right other than a Negro under 1981-1982?"

"(Mr. Brown) No, except such rights as a white person, that might flow to a white person."

Should this Honorable Court rule in favor of Press, under the Civil Rights Act of 1966, it would, of necessity, rule that Press, Rosner, and every other Negro in the United States would be entitled to membership, in Wheaton-Haven, until the maximum of three hundred twenty-five had been reached, placing them in a status preferred over white persons who, the Respondents concede, may be denied admission for any reason, however frivolous.

### CONCLUSION

Of necessity, the Respondents heavily rely on the Opinion of the Court of Appeals. It would be presumptuous for them to assume that they could improve upon the Appellate Opinion, delivered by the Court following more than one year of evaluation. Interestingly, the Petitioners do not attempt to contradict the relevant factual elements of this Opinion, and the well-reasoned application of the law. No attempt is made to rationalize the significant disparity be-

tween the facts in Sullivan and those in Wheaton-Haven, as they bear on the issues. The Respondents can only conclude by posing the same question to this Honorable Court as was posed before the District Court, before the Appellate Court, and which the Petitioners do not answer: "If Wheaton-Haven is not a truly private club, exempt from the various civil rights statutes, what then could have been done or should have been done to so qualify this organization." The Respondents pray that the judgment of the Fourth Circuit Court of Appeals be affirmed.

Respectfully submitted,

HENRY J. NOYES,

Attorney for Respondents.

## TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED .....	1
STATUTES INVOLVED .....	2
STATEMENT .....	2
SUMMARY OF ARGUMENT .....	5
<b>ARGUMENT:</b>	
I. As a private club or establishment not in fact open to the public, Wheaton-Haven is not within the coverage of the 1964 Civil Rights Act (42 U.S.C. §2000a) or the 1866 Civil Rights Act (42 U.S.C. §§1981, 1982) .....	7
A. Wheaton-Haven is a private club or establishment not in fact open to the public' .....	7
B. Wheaton-Haven as an exempt establishment under the 1964 Civil Rights Act is not subject to liability under 42 U.S.C. §§1981 and 1982 .....	16
C. Application of the Civil Rights Acts of 1866 or 1964 to Wheaton-Haven would raise serious constitutional issues .....	20
II. Judgment was properly entered in favor of a director of Wheaton-Haven who was opposed to the policy of racial discrimination attributed to the corporation .....	25
CONCLUSION .....	29

## TABLE OF CITATIONS

### Cases

Bel v. Gousha, 313 F. Supp. 1030 (E.D. Wis. 1970) .....	27
Stein v. ASCAP, 29 F. Supp. 388 (S.D.N.Y. 1939) .....	23
ard v. State Bar of Arizona, 401 U.S. 1 (1971) .....	21
ll v. Kenwood Golf and Country Club, Inc., 312 F. Supp. 753 (D. Md. 1970) .....	12

## II

	PAGE
Bell v. Maryland, 378 U.S. 226 (1964) .....	24
Bishop of Exeter v. Hele, Show. Parl. Cas. 114, 1 Eng. Rep. 61 (H.L. 1693) .....	22
Board of Regents of State Colleges v. Roth, 92 S. Ct. 2701 (1972) .....	19, 23
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) .....	15
Churchwardens of St. Bartholomew's, 3 Salk. 87, 91 Eng. Rep. 709 (K.B. 1701) .....	22
Civil Rights Cases, 109 U.S. 3 (1883) .....	24
Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966) .....	12
Daniel v. Paul, 395 U.S. 298 (1969) .....	9, 10, 11
Derby v. University of Wisconsin, 325 F. Supp. 163 (E.D. Wis. 1971) .....	27
Evans v. Newton, 382 U.S. 296 (1966) .....	21, 24, 25
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) .....	26
Grempler v. Multiple List Bureau, 258 Md. 419, 266 A.2d 1 (1970) .....	23
Griswold v. Connecticut, 381 U.S. 479 (1965) .....	21
Hunter v. Erickson, 393 U.S. 385 (1969) .....	17
Jaffke v. Dunham, 352 U.S. 280 (1957) .....	25
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) ....	13, 17
Lahr v. Adell Chemical Co., Inc., 300 F.2d 256 (1st Cir. 1962) .....	26
Laird v. Tatum, 92 S. Ct. 2318 (1972) .....	20
Langnes v. Green, 282 U.S. 531 (1931) .....	25
Lehigh Valley Coal Co. v. Yensavage, 218 F. 547 (2nd Cir. 1914) .....	18
Lessard v. Van Dale, 318 F. Supp. 74 (E.D. Wis. 1970)	27
Lloyd Corp. v. Tanner, 92 S. Ct. 2219 (1972) .....	13
Lobato v. Pay Less Drug Stores, 261 F.2d 406 (10th Cir. 1958) .....	26
McCoy v. Stroud & Co., 373 F.2d 862 (3rd Cir. 1967)	26

# iii

	PAGE
McKane v. Adams, 123 N.Y. 609, 25 N.E. 1057 (1890)	20
Mayer v. Journeymen Stone-Cutters' Ass'n., 47 N.J. Eq. 519, 20 A. 492 (1890)	23
Miller v. Amusement Enterprises, Inc., 394 F.2d 342 (5th Cir. 1968)	12
Moose Lodge No. 107 v. Irvis, 92 S. Ct. 1965 (1972)	13, 14, 15, 21
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)	21
NAACP v. Button, 371 U.S. 415 (1963)	21
Nesmith v. YMCA of Raleigh, N.C., 397 F.2d 96 (4th Cir. 1968)	12
NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967)	18
NLRB v. Drivers, etc., Local Union No. 639, 362 U.S. 274 (1960)	18
Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393 (2d Cir. 1943)	26
Pullman Co. v. Knott, 243 U.S. 447 (1917)	28
Ross v. Ebert, 275 Wis. 523, 82 N.W. 2d 315 (1957)	23
Schwartz v. Galveston Independent School District, 309 F. Supp. 1034 (S.D. Texas, 1970)	27
Scott v. Young, 421 F.2d 143 (4th Cir. 1970) cert. denied, 398 U.S. 929 (1970)	11
SEC v. Union Corp. of America, 205 F. Supp. 518, aff'd. 309 F.2d 93 (8th Cir. 1962)	26
Sullivan v. Little Hunting Park, 396 U.S. 229 (1969)	1, 6, 14, 16, 18, 19, 20, 21
Talbot v. Seeman, 1 Cranch 1 (1801)	18
The King v. the Archbishop of Canterbury and the Bishop of London, 15 East 117, 104 Eng. Rep. 789 (K.B. 1812)	22
Trafficante v. Metropolitan Life Ins. Co., 446 F.2d 1158 (9th Cir. 1971), cert. granted, 405 U.S. 915 (No. 71-708) (1972)	20
Trautwein v. Harbout, 40 N.J. Super. 247, 123 A.2d 30 (1956)	23



	PAGE
Two Guys From Harrison-Allentown, Inc., v. McGinley, 366 U.S. 582 (1961) .....	28
United States v. Freeman, 3 How. 556 (1845) .....	18
United States v. Richberg, 398 F.2d 523 (5 Cir. 1968) .....	11
United States v. Stewart, 311 U.S. 60 (1940) .....	18
Walling v. General Industries Co., 330 U.S. 545 (1947) .....	25
Warner Valley Stock Co. v. Smith, 165 U.S. 28 (1897) .....	28
Wesley v. City of Savannah, Georgia, 294 F. Supp. 698 (S.D. Ga. 1969) .....	27
White v. Brownell, 2 Daly 329 (N.Y. 1968) .....	20

### Statutory Provisions

Civil Rights Act of 1866, Section 1, 14 Stat. 27 (42 U.S.C.):	
Section 1981 .....	6, 7, 8
Section 1982 .....	6, 7, 8, 12
Civil Rights Act of 1964, Title II, 78 Stat. 243 (42 U.S.C.):	
Section 2000a .....	5, 7
Section 2000a(e) .....	3, 5, 6, 8, 12, 13
Code of Montgomery County, Maryland as amended (1965), Section 111-2 .....	2

### Miscellaneous

6 AM. JUR. 2d Associations .....	22
1 W. Blackstone, Commentaries (1765) .....	22
A. De Tocqueville, 1 Democracy in America (Bradley ed. 1954) .....	22, 23
3 FLETCHER CYCLOPEDIA CORPORATIONS §1137 (1965 ed.) .....	25, 26
10 FLETCHER CYCLOPEDIA CORPORATIONS §4873 (1970 rev. ed.) .....	26
Hearings on S. 1732, Senate Committee on Commerce, 88th Con. 1st Sess. ....	16
Schlesinger, <i>Biography of a Nation of Joiners</i> , 50 AM. HIST. REV. (1944) .....	23
W. Warner, <i>The Emergent American Society</i> (1967) .....	23
1964 U.S. Code Con. and Ad. News .....	8, 16

IN THE  
**Supreme Court of the United States**

---

OCTOBER TERM, 1972

---

No. 71-1136

---

MURRAY TILLMAN, ET AL.,

*Petitioners,*

v.

WHEATON HAVEN RECREATION ASSOCIATION,  
INC., ET AL.,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

---

BRIEF ON THE MERITS FOR E. RICHARD McINTYRE,  
RESPONDENT

---

**QUESTIONS PRESENTED**

The following question is raised by petitioners:

Whether the court of appeals erred in holding a community recreation association to be a private club and hence exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C. §§1981, 1962 and 42 U.S.C. §2000a), despite the fact that this Court in a previous case (*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969)) held that an association with vir-

tually identical characteristics could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.

In a brief filed prior to the grant of certiorari, this respondent, E. Richard McIntyre, presented the following questions:

Whether judgment was properly entered in favor of a director of the Wheaton-Haven Recreation Association, Inc., who was opposed to the policy of racial discrimination attributed to the corporation.

Whether an action against a corporation and its directors abates or is rendered moot as to a director removed from office for opposition to the policy of racial discrimination attributed to the corporation.

This Court's grant of certiorari on May 15, 1972, is unrestricted. Accordingly, if the first question is decided in favor of petitioners, this Court should consider and decide the two remaining questions posed by this respondent.

### STATUTES INVOLVED

The pertinent civil rights statutes are set out in the Brief for the Petitioners (2-4). In addition, relevant paragraphs contained in the CODE OF MONTGOMERY COUNTY, MARYLAND §111-2, *as amended* (1965), are contained in the Brief of Respondents at 15-16.

### STATEMENT

Petitioners brought this action in the United States District Court for the District of Maryland under the 1866 Civil Rights Act and the 1964 Civil Rights Act to compel Wheaton-Haven, a non-profit corporation which operates a member-owned community swimming pool, to extend membership and guest privileges without racial discrimination. Petitioners sought declaratory and injunctive re-

lied, as well as damages, against Wheaton-Haven and 13 of its officers and directors.

This respondent, E. Richard McIntyre, was joined to this action solely because he served on the board of directors when Wheaton-Haven adopted the discriminatory policy complained of. No individual act of discrimination was attributed to him personally. The complaint, as twice amended (A. 4-21), sought to visit collective liability upon the officers and/or directors, based upon the alleged decision of the board of directors to withhold membership and guest privileges from Negro applicants.

In the district court, McIntyre filed a timely motion to dismiss the action as to him or, in the alternative, for summary judgment (A. 34-36), urging *inter alia* the failure of the complaint to state a claim against him individually. In support of summary judgment McIntyre relied upon his deposition, on file in these proceedings (A. 100-129), wherein he denied under oath having supported any racially-motivated policy of exclusion and testified that he favored the admission of petitioners on a non-discriminatory basis (A. 111, 124, 125, 126).

Without passing upon this motion, however, the district court proceeded instead to hold that Wheaton-Haven was "a private club or other establishment not in fact open to the public" under 42 U.S.C. §2000a(e) and thereby exempt from civil rights coverage. No other question was considered or decided as the district court, in acting upon Wheaton-Haven's motion for summary judgment, granted judgment for all respondents (Pet. App. C). The Fourth Circuit affirmed that judgment on October 27, 1971, and denied rehearing *en banc* on December 16, 1971 (Pet. App. B), but did not pass upon the points briefed and argued

by McIntyre except to note that he "championed the cause of the admission of Dr. Press", one of the petitioners (Pet. App. B-30).<sup>1</sup>

The pivotal issue involved in this controversy, here and in the courts below, is whether Wheaton-Haven is a private club or establishment not in fact open to the public. Although petitioners outline many of the facts bearing on this issue, we are obliged to correct several inaccuracies which appear therein.

Contrary to petitioners' statement (Pet. Br. 22), it is not true that the record fails to disclose the race of the one applicant formally rejected in the past by Wheaton-Haven. The district court found the rejected applicant was white (Pet. App. C-2). Second, while petitioners assert unequivocally that Wheaton-Haven's new guest policy of limiting guests to relatives of members "was adopted in response to the Tillman's bringing a Negro guest to the pool . . ." (Pet. Br. 5), the district court found that the guest limitation "was intended to keep down the burgeoning number of guests" and merely ventured that petitioner Rosner, the Tillman's guest, "perhaps precipitated" the policy (Pet. App. C-3). This new policy was a further limitation on the existing guest policy which excluded guests residing within a three-quarter mile radius of the pool (A. 115). Third, Wheaton-Haven does not hold itself out to the public, admit the public or advertise to the public, and has not done so since it was organized in 1958 (Pet. App. B-18; C-2, C-3).

Finally, Wheaton-Haven's board of directors is popularly elected by the membership at regular meetings, and

---

<sup>1</sup>"Pet. App." refers to the appendix to the petition for writ of certiorari. "A." refers to the appendix submitted with Petitioners' Brief on the Merits.



Wheaton-Haven is member-controlled, member-financed, and member-governed in every respect (A. 42-61; Pet. App. C-2). This is amply demonstrated by the fact that the entire membership voted decisively at the November 1968 meeting to affirm the policy of excluding Negroes as members and to continue the relatives-only guest limitation (A. 109, 117). Moreover, the same membership, at a meeting late in 1970, defeated McIntyre in his bid for reelection to the board of directors.

The case is here on writ of certiorari, granted on May 15, 1972. 92 S. Ct. 1770 (1972).

### SUMMARY OF ARGUMENT

1. While respondent McIntyre has consistently opposed Wheaton-Haven's exclusionary policies, he agrees with the courts below that Wheaton-Haven is a private club or establishment not in fact open to the public. Its non-public character takes it outside the ambit of the Civil Rights Act of 1964 (42 U.S.C. §2000a) by reason of the affirmative exclusion set forth in the statute (42 U.S.C. §2000a(e)). Unlike the host of "private" clubs created to evade the 1964 Act, Wheaton-Haven has always been closed to the public. The indicia of Wheaton-Haven's non-public character, a character that has remained unchanged since 1958, are several: the fact that it is member-controlled, member-financed and member-governed in every respect; that its membership and guest policies are determined by vote of the members; that it does not advertise its facilities, solicit membership, or open its facilities to the public under any circumstances; that it screens and interviews prospective members; that its initiation fees and dues are relatively expensive; and that not all persons desiring membership have been accepted in the past. Given these factors, Wheaton-Haven cannot be considered a public accommodation. "[I]ts

form of organization, its manner of operation, and its member activities are all characteristic of a bona fide private club rather than a place of public accommodation. . . ." (Pet. App. B-22).

As a private club or establishment not in fact open to the public, Wheaton-Haven's prerogatives are preserved by the express exception (42 U.S.C. §2000a(e)) in the 1964 Civil Rights Act, an exception which constitutes a statutory recognition of associational rights grounded in the Constitution. By reason of its status as a self-governing organization, Wheaton-Haven also falls outside the ambit of 42 U.S.C. §§1981 and 1982. The 1964 statute codifies the area of associational privacy that has been consistently recognized by this Court as subject to constitutional protection. The legislative history of the 1964 Act affirms the proposition that Wheaton-Haven, excepted expressly under the 1964 statute, is excepted by implication also from the earlier statutes enacted in 1866.

Moreover, petitioners have not shown how any of their rights under the 1866 Act have been infringed. Surely §1981 was not written to insure contract on demand, provided that the demand was made by a black citizen. Nor can a §1982 claim lie. Unlike the situation in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), Wheaton-Haven has not interfered with a real property transaction. Petitioner Press bought his residence from a vendor who had no membership in Wheaton-Haven and no property interest to convey. Petitioner Tillman, unlike the petitioner in *Sullivan*, can claim no interference either since the guest rules apply to him no differently than any other member of Wheaton-Haven. Since his claim must fall, so does that of his guest, petitioner Rosner.

An extension of the Civil Rights Acts of 1866 or 1964 to embrace a member-controlled association such as Wheaton-

Haven would raise serious constitutional issues. To compel it and its members to receive persons of all races or else disband would impair the traditional rights of free association.

2. Assuming *arguendo* that Wheaton-Haven falls within coverage of civil rights legislation, the judgment should be affirmed as to McIntyre. As the record indicates, he has disapproved the alleged exclusionary policies in his role as a director and then sought to enlist membership support for his position. Indeed, the complaint makes no specific claim against McIntyre. The authorities uniformly hold that a director need not answer personally for corporate acts, absent specific involvement not here shown. This rule has particular application to McIntyre who opposed the acts complained of and who was later defeated by vote of the membership in his bid for reelection to the Wheaton-Haven board.

## ARGUMENT

### I.

AS A PRIVATE CLUB OR ESTABLISHMENT NOT IN FACT OPEN TO THE PUBLIC, WHEATON-HAVEN IS NOT WITHIN THE COVERAGE OF THE 1964 CIVIL RIGHTS ACT (42 U.S.C. §2000a) OR THE 1866 CIVIL RIGHTS ACT (42 U.S.C. §§1981, 1982).

#### A. WHEATON-HAVEN IS A PRIVATE CLUB OR ESTABLISHMENT NOT IN FACT OPEN TO THE PUBLIC.

As a matter of club policy, it is McIntyre's position that Wheaton-Haven should not exclude anyone, member or guest, solely on the basis of race. Such exclusions are parochial, ill-advised and inimical to Wheaton-Haven's best interests. However, petitioners are plainly incorrect when they claim that Wheaton-Haven is a public accommodation obliged by Congress to open its doors to all who desire admission (Pet. Br. 28). Rather, we submit, the record sustains the holdings of the two courts below that

Wheaton-Haven, in legal parlance, is a "private club or establishment not in fact open to the public" (42 U.S.C. §2000a(e)) and is entitled to maintain its associational privacy against unwelcome claims to admission.<sup>2</sup>

Petitioners employ varied techniques in their attempt to depict Wheaton-Haven as a public facility. They assert:

(1) Wheaton-Haven has "no plan or purpose of exclusiveness" (Pet. Br. 21),

(2) "personal compatibility with other members is not a qualification for membership" (Pet. Br. 21),

(3) "the sole determinant for membership is residence within the prescribed area" (Pet. Br. 21),

(4) Wheaton-Haven's \$375 membership initiation fee and \$50-60 annual dues are not "significant" (Pet. Br. 29),

(5) the numerical limitation on membership is not dispositive of its non-public status but merely "a limitation in the interest of health and safety" (Pet. Br. 29).

---

<sup>2</sup> The "private club or establishment not in fact open to the public" exception (42 U.S.C. §2000a(e)) in the 1964 Civil Rights Act exempted such establishments from the coverage of the statute. The court of appeals held that this positive exception in the 1964 Act operated by necessity to insulate such exempt establishments from liability under the 1866 Civil Rights Act (42 U.S.C. §§1981, 1982) (Pet. App. B-6). Chief Judge Haynsworth, writing for the court, recognized that the exception was an explicit statutory recognition of rights grounded in the Constitution. "The majority [of Congress], however, justified the exemption for private clubs as an appropriate recognition of rights of privacy and associational preferences in cases 'where freedom of association might logically come into play \* \* \*.'" See Additional [majority] Views on H.R. 7152 of Reps. McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell, 1964 U. S. Code Cong. & Ad. News 2487, 2495. The decision below is harmonious with prior holdings of this Court recognizing the right of persons to associate voluntarily. See discussion *infra*, at 21, 24-25. While the 1866 Act contains no express exemption for private clubs, it cannot be applied in a manner which infringes constitutionally protected rights.

Thus, petitioners conclude that "Wheaton-Haven is functionally similar to the recreational facility in *Daniel v. Paul*, 395 U.S. 298 (1969)" and "masquerade[s] as a private club merely in order to exclude Negroes from its facilities" (Pet. Br. 21).

Petitioners' argument is rooted in factual inaccuracies and omissions. Initially, it seems obvious that an organization with detailed by-laws, with limited and relatively expensive memberships, with a policy of granting membership only to those approved by a majority vote of the elected board of directors or the general membership, with interviews and screening procedures, and with a policy of receiving only members and their guests must have some "plan or purpose" other than race. Second, social and financial acceptability, shared interests in swimming, and such subjective factors as compatibility and decent behavior are sought in prospective members even if the by-laws do not so detail. Above all, the general public is not invited to swim with the members. Third, it is demonstrably untrue that geography is the sole determinant for membership inasmuch as the by-laws explicitly permit 30% of the membership to be drawn from outside the prescribed area (A. 43) and the membership rolls include families outside the area (A. 128). The "hollow ring" (Pet. Br. 22) of Wheaton-Haven's claimed status was not discerned by Chief Judge Haynsworth, writing for the court of appeals:

That standards are not immediately and precisely ascertainable, however, does not mean that they do not exist. Some considerations of social and financial standing are implicit in the size of the fees and the dues. There are selective elements other than race alone. Rejection of white applicants is, though rare, not unheard of (Pet. App. B-21). We cannot say that its inability to produce a detailed set of clear, precise



and unmistakable standards for membership marks it as a covered establishment (Pet. App. B-22).

The attempt by petitioners (Pet. Br. 29) to equate the Wheaton-Haven initiation fee of \$375 and the annual dues of \$50-\$60 with a lump sum public admission charge ignores the fact that the public has never been admitted to Wheaton-Haven under any circumstances (Pet. App. C-2, C-3).<sup>3</sup>

Their parallel attempt (Pet. Br. 29) to identify the numerical limitation on membership as only a variant of the seating capacity of a public accommodation is disingenuous. If the limitation was made only in the interest of health and safety, it would seem that the limitation should apply to daily pool use and not to membership. That limitation was more likely intended to distribute among Wheaton-Haven's middle class members the financial burden of maintaining the pool facilities. Wheaton-Haven remains small enough to insure associational privacy but large enough to prevent membership costs from becoming exorbitant.

However, petitioners' argument is more instructive for what it conceals. Petitioners ignore the fact that Wheaton-Haven is member-owned and member-controlled and hence exempt from both state and federal income taxes as a non-profit, member-owned and member-controlled recreational facility (A. 10, 97, 99; Pet. App. B-19, C-4). They ignore the fact that well-attended annual membership meetings are held (Pet. App. B-18). They ignore the fact that mem-

---

<sup>3</sup> Montgomery County, Maryland, an amicus curiae here, also feels that this investment is a veritable drop in the bucket to the average family in Montgomery County and hence is functionally equivalent to a sham "membership fee" (Brief for Montgomery County at 22). Any resident of Montgomery County would be puzzled by the economic logic that equates \$325 and \$50 with the 25 cent "membership fee" paid by transients in *Daniel v. Paul*, 395 U.S. 298 (1969).

bership interviews are conducted (Pet. App. B-21). They ignore the fact that Wheaton-Haven does not publicly advertise its facilities or hold itself out to the general public (Pet. App. B-18, 19). They ignore the fact that the board of directors is elected popularly by the members, that board action is subject to membership veto, and that directors with unpopular views have been voted out of office. They ignore the fact that the general membership ratified the board's member and guest policy (A. 117).

Petitioners conclude that Wheaton-Haven is "functionally similar" (Pet. Br. 21) to the recreation facility in *Daniel v. Paul*, 395 U.S. 298 (1969) and hence covered by the 1964 Civil Rights Act. However, even a casual perusal of that case belies this "functional similarity". In *Daniel v. Paul*, this Court held that Lake Nixon, a 232-acre amusement and recreation park, was a public accommodation covered by the 1964 Act. Lake Nixon's assertion that it was "not in fact open to the public" was dismissed in light of a record disclosing that membership cost 25 cents per season and the "club" catered to more than 100,000 transient "members" each year. As Mr. Justice Brennan wrote for this Court, Lake Nixon "was simply a business operated for profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs." Id. 302.

Wheaton-Haven is not Lake Nixon. Nor is Wheaton-Haven the restaurant on the interstate highway that has suddenly taken on the trappings of a "private club". *United States v. Richberg*, 398 F.2d 523 (5th Cir. 1968). Wheaton-Haven is not the "private" 23-acre recreation center with a general admission fee for whites at the gate. *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970). It is not the "private" amusement park that publicly advertises "everybody come" and then denies black children the right to

ice skate. *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968). It is not the nationally-affiliated organization that grudgingly admits blacks into its lodging facilities but refuses them admission to adjacent and common athletic facilities. *Nesmith v. YMCA of Raleigh, N.C.*, 397 F.2d 96 (4th Cir. 1968). It is not a country club or swim club operated for corporate profit without any member involvement. *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753 (D. Md. 1970); *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966).

It is true that Wheaton-Haven draws its membership primarily from the surrounding community. At the same time, however, it is not an establishment which invites the public while masquerading as a private club. Member-owned, member-controlled and member-governed, it does not seek the public, admit the public, or want the public. Wheaton-Haven meets the only express test laid down by Congress in the 1964 Civil Rights Act — an "establishment not in fact open to the public" (42 U.S.C. §2000 a(e)). While its membership is drawn primarily from families within a 3/4-mile radius of the pool, neighborhood proximity does not and never has mandated acceptance upon demand.<sup>4</sup> Wheaton-Haven's by-laws contain no stated policy that personal compatibility or acceptability are necessary for membership just as they contain no racial criteria.<sup>5</sup> Each

<sup>4</sup> Petitioners' reliance (Pet. Br. 21) on the neighborhood relatedness of Wheaton-Haven in order to bring the club within the ambit of 42 U.S.C. §1982 is misplaced. As a practical matter people seeking admission to a private club will inevitably choose one which is conveniently located.

<sup>5</sup> The district court addressed this point below: "Admittedly the standard by which they determine eligibility for membership is not set forth in the corporation's charter or by-laws or in any Board of Directors resolution; but, *since that is the common practice of all clubs*, the absence of such an articulated standard does not imply that the only standard is racial" (Pet. App. C-8) (*Italics supplied*). Club

applicant is screened, interviewed and elected by actual vote of the elected board of directors or of the general membership (A. 43). A veto power remains in the members (A. 43). In short, Wheaton-Haven is maintained and governed by its members and their elected board — a pool where members can swim and socialize with other members on the humid days and nights of summer.

If petitioners were to prevail in their contention few voluntary self-governing private associations could retain any discretion in the selection of prospective members. Their theory of "exclusiveness" might not disturb the Society of Mayflower Descendants but it would, carried to its inevitable conclusion, transform member facilities maintained by private organizations "not in fact open to the public" into public accommodations.<sup>6</sup> It cannot be said that Wheaton-Haven lacks selectivity because it exercises its membership veto power infrequently (Pet. Br. 22). If frequency were a necessary factor, the 1866 Civil Rights Act could not have been revived. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court recognized that the century-old provisions of 42 U.S.C. §1982 were effective and that "the fact that the statute lay partially dormant for many years cannot be held to diminish its force today." *Id.* at 437. Likewise, Wheaton-Haven's discretion to reject applicants is in no way diminished by infrequent exercise.

admissions policies invariably mirror the likes and dislikes of the membership and thus defy precise formulation — a truth encapsulated in the ageless nursery rhyme: "I do not like the Dr. Fell / the reason why I cannot tell / but this I know, and know full well / I do not like thee Dr. Fell".

<sup>6</sup> In a similar context last term, this Court refused to extend a public function analysis so far as to emasculate the distinction between private and public property. *Lloyd Corp. v. Tanner*, 92 S. Ct. 2219 (1972). Cf. *Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965 (1972), where it was held that a state liquor license did not alter the character of a private club.

Nor can Wheaton-Haven's discretionary prerogatives be discounted because they have been exercised *formally* on few occasions (Pet. Br. 22). As Chief Judge Haynsworth said for the court below, such groups customarily exercise their power to reject by informal screening:

It is typical of the manner in which private clubs often screen prospective members. Very often the actual application for membership is strictly a formality, for the club's decision will have been already made.

Dr. Press, of course, was rejected in exactly this manner. Because he was never allowed to make a formal application for membership, he would not appear on Wheaton-Haven's books as having been rejected, despite the fact that we know he was (Pet. App. B-21, n. 23).

We do not understand *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) to have articulated an exclusive set of standards for determining the public or non-public character of associations (Pet. Br. 20-21). Little Hunting Park's claims of privacy were rejected in *Sullivan* without extended comment.<sup>7</sup> The formulation expressed in *Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965, 1970 (1972), is more to the point:

Moose Lodge is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only

<sup>7</sup> "The Virginia trial court rested on its conclusion that Little Hunting Park was a private social club. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race." *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969).



by invitation of a member or upon invitation of the house committee.

In *Moose Lodge* the only elements of selectivity other than race consisted of being an adult male with deistic beliefs and a good moral character.<sup>8</sup> It is apparent that racial selectivity was the paramount if not the only real consideration for membership in *Moose Lodge No. 107*. *Wheaton-Haven*, with its more limited membership, and its implicit financial and social qualifications for membership, is as surely a private club — a member-controlled, self-governing, voluntary association “not in fact open to the public”.

To label *Wheaton-Haven* a public accommodation and within the coverage of the 1964 Act would emasculate the “not in fact open to the public” language that Congress so deliberately inserted in the statute. The distinction between a public accommodation and an establishment not in fact open to the public was a matter of significant concern to Congress. It was a distinction made after “sifting facts and weighing circumstances”. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). We submit that Chief Judge Haynsworth was eminently correct when he concluded for the court of appeals:

[I]ts form of organization, its manner of operation, and its member activities are all characteristic of a bona fide private club rather than a place of public accommodation, and . . . it clearly meets the only

<sup>8</sup> “The regulation means . . . that it [*Lodge 107*] must adhere to the racially discriminatory provision of the Constitution of its Supreme Lodge that ‘membership of the lodge shall be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being’.” *Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965, 1975 (1972) (cited by Douglas, J., dissenting).

express test set out by Congress — that it be 'not in fact open to the public' . . . (Pet. App. B-22).

**B. WHEATON-HAVEN AS AN EXEMPT ESTABLISHMENT UNDER THE 1964 CIVIL RIGHTS ACT IS NOT SUBJECT TO LIABILITY UNDER 42 U.S.C. §§1981 AND 1982.**

The court of appeals found that the private club exemption in the 1964 Act was a statutory recognition of constitutionally grounded rights. "The majority [of Congress], however, justified the exemption for private clubs as an appropriate recognition of rights of privacy and associational preferences in cases 'where freedom of association might logically come into play \* \* \*'" (Pet. App. B-7, n. 5).<sup>9</sup>

<sup>9</sup> The court of appeals relied primarily upon statutory construction. Chief Judge Haynsworth, recognizing that repeal by implication is not favored, said for the court:

We have here not the mere failure in a later statute to include a prohibition contained in an earlier one covering the same subject matter; rather to the earlier general statute . . . is added a later one which expressly protects it, if the defendant is in fact a private club (Pet. App. B-6, n. 5).

The holding below is especially compelling in view of the fact that the 1964 Congress, believing it was writing on a clean slate, positively exempted establishments not in fact open to the public. The Congressional understanding in 1964 as to the reach of the 1866 Act is certainly more than "very remotely relevant" (Brief for United States as Amicus Curiae at 26, n. 15). It is obviously instructive that the Congress, legislating in *vacuo*, created a positive exemption by explicit recognition of the associational rights of private clubs. See generally *Hearings on S. 1732 before Senate Committee on Commerce*, 88th Con., 1st Sess. The private club exception was in Title II from introduction of the bill until passage and only underwent minor rephrasing. *Senate Report No. 872, 1964 U.S. Code Cong. & Ad. News* 2355, 2359. The clear intent of the 1964 Congress was to explicitly reserve an area of activity which the statute could not reach. See *supra* n. 1.

The decision below is also consistent with *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) wherein this Court did not hold §1982 to be applicable until first deciding that Little Hunting Park was not a private club. See, *id.* at 236.

Petitioners now contend that §§1981 and 1982 apply to private organizations not in fact open to the public even if such organizations are specifically exempted by the 1964 Act. They characterize the Fourth Circuit's holding as a "demonstrated lack of regard for precedent set by this Court" (Pet. Br. 15, n. 8). In the district court, however, petitioners conceded that, if Wheaton-Haven was a private club, a §1981 or §1982 claim would not lie.<sup>10</sup> If Wheaton-Haven is an excepted organization free to ignore claims of petitioners under the 1964 Act, it would be anomalous to compel it to defer to identical claims under the less explicit 1866 Act. As the district court said below:

The determination that Wheaton-Haven's discrimination is permitted under the 1964 Act which explicitly deals with such a factual situation should preclude a determination that the same conduct violates the less explicitly applicable principles of Section 1981 and Section 1982. (Pet. App. C-10).

The fact that §§1981 and 1982 contain no specific exception (comparable to that which appears in the more sophisticated 1964 Act) does not mean the 1866 Act and the later statute are at war with one another. In *Hunter v. Erickson*, 393 U.S. 385, 388 (1969), this Court noted that the century-old Act considered in *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), should be read together with later statutes on the same subject, so as not to pre-empt that which the later statutes explicitly preserve. This reinforces the familiar principle that legislation *in pari materia* should

<sup>10</sup> "Mr. Brown [attorney for petitioners]: But, of course, the question of whether its a private club, we will also concede for this — for any purposes, would — is also relevant both to Section 2000 as well as Sections 1981 and 1982, we don't think it is a private club, but if it is a private club, then neither 1981, 1982 or 2000 would apply, I think the same principles would be applicable." Transcript of Proceedings in United States District Court for District of Maryland, June 24, 1970, at 18, on file in this Court.

be read together.<sup>11</sup> "It is clear that 'all acts in *pari materia* are to be taken together, as if they were one law.'" *United States v. Stewart*, 311 U.S. 60, 64 (1940); *United States v. Freeman*, 3 How. 556, 564 (1845). See also, *Talbot v. Seeman*, 1 Cranch 1, 34-35 (1801). As this Court said in a parallel context:

To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.

*NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 194 (1967); *NLRB v. Drivers, Etc., Local Union No. 639*, 362 U.S. 274, 291-292 (1960). (Italics supplied.)

However, it may not be necessary for this Court to inquire into the so-called preemptive effect of the 1964 Act upon §§1981 and 1982 since it is clear that petitioners have not shown a violation of any contractual or property rights secured by §§1981 or 1982. Petitioners seek to establish violations of §§1981 or 1982 by bringing Wheaton-Haven under the umbrella of *Sullivan v. Little Hunting Park*, *supra*, (Pet. Br. 10-27). In *Sullivan*, the petitioner leased his home to Freeman, a Negro. Included in the lease was an assignment of the membership share in Little Hunting Park. Little Hunting Park refused to accept the assignment.

The attempt to equate the non-transferable membership in Wheaton-Haven with the freely transferable member-

<sup>11</sup> Judge Learned Hand once alluded to a parallel principle of statutory construction in *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2nd Cir. 1914) where he said that statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."

ship share of *Sullivan* is fanciful. A Wheaton-Haven membership is not transferable. If a Wheaton-Haven member sells his home to a purchaser, Wheaton-Haven may repurchase the membership, depending on the existence of a waiting list (A. 47). The purchaser of the home has a first option "to purchase the membership of the seller solely from the Association . . .; provided, however, that the seller forwards a written resignation to the association, and the purchaser makes a formal written application for membership . . ." (A. 47) (*Italics supplied.*) The application of an option holder must be accepted by the board of directors or the membership, in the same manner as any other applicant for membership. The first option merely allows the holder to have his application considered before others on the waiting list. As Chief Judge Haynsworth said for the court of appeals: "It is far too tenuous a thread to support a conclusion that there is a transfer of membership incident to the purchase of property" (Pet. App. B-13). Moreover, the argument does not avail petitioners in the slightest since Dr. Press's vendor was never a member of Wheaton-Haven and had no option of any kind to convey.<sup>12</sup>

<sup>12</sup> Assuming *arguendo* that a first option in Wheaton-Haven could be an incident of the real property, one is at a loss to discern how Dr. Press has any rights under §1982. Dr. Press, it is agreed, bought his residence from a seller who was not a member of Wheaton-Haven (Pet. App. B-13, n. 14; C-11). Thus factually the instant case is inapposite to *Sullivan v. Little Hunting Park*, since the club membership share is not annexed to a real estate transaction. Wheaton-Haven has not interfered on the basis of race with the purchase and sale of any real or personal property between Dr. Press and anyone. The petitioners' retroactive argument, in effect, says that the membership share could be, in the future, an incident of a real estate transaction and that, therefore, it is an incident of the real estate now and was so at the time of Dr. Press's purchase (Pet. Br. 9, 10, 17, 18). Such an argument is without merit.

As this Court said last term: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 92 S. Ct. 2701, 2709 (1972). See discussion *supra* n. 14, ¶ 10.



Since Dr. Press has not made out a §1982 claim, his complaint must be bottomed on §1981. However, §1981 surely does not mandate a contract on demand, provided the demand is made by a black citizen (Pet. Br. 17).<sup>13</sup> Petitioners' argument implies that Wheaton-Haven makes a continuing offer of membership to whites while denying that offer to blacks. But that simply is not borne out by the record. Dr. Press, as have all other prospective applicants in the past, attempted to solicit an offer from Wheaton-Haven. No offer was forthcoming (Pet. App. B-21, n.23). The petitioners find an offer where none was ever made. Surely §1981 was not enacted to drastically alter the law of contract. It was enacted to allow willing parties to enter a contract free of racial impediments. The asserted "contract" does not fit that description.<sup>14</sup>

**C. APPLICATION OF THE CIVIL RIGHTS ACTS OF 1866 OR 1964  
TO WHEATON-HAVEN WOULD RAISE SERIOUS  
CONSTITUTIONAL QUESTIONS.**

The "not open to the public" exception of the 1964 Civil Rights Act is a statutory recognition of the historic right of

<sup>13</sup> Historically, courts have declined to imply a contractual right of admission into private, voluntary organizations. "Membership is a privilege, which may be accorded or withheld, and not a right, which can be gained independently and then enforced." *McKane v. Adams*, 123 N.Y. 609, 612, 25 N.E. 1057 (1890); *White v. Brownell*, 2 Daly 329, 358 (N.Y. 1868).

<sup>14</sup> If Dr. Press has no §1981 or §1982 claim still less can be said of petitioner Tillman's rights and those of his guest, petitioner Rosner, whose claims stand or fall with Tillman's. Unlike the petitioners in *Sullivan v. Little Hunting Park*, Tillman has been treated no differently than any other member of Wheaton-Haven. See *Traficante v. Metropolitan Life Ins. Co.*, 446 F.2d 1158 (9th Cir. 1971), cert. granted, 405 U.S. 915 (No. 71-708) (1972). As a white member, Tillman's own right under §1981 to receive the same contractual benefits "enjoyed by white citizens" would seem unimpaired. Nor may he vindicate alleged racial discrimination against his guest since "a litigant has standing to seek redress for injuries done to him but may not seek redress for injuries done to others." *Laird v. Tatum*, 92 S. Ct. 2318, 2326 n. 7 (1972). Petitioner Rosner's contractual claims necessarily fall with her host's.

individuals to choose their associates. As noted earlier, Wheaton-Haven comes within the purview of that exception as being, in fact, not open to the public. To sustain the position advocated by petitioners would create serious problems, since "lurking in the background are grave constitutional issues should §1982<sup>15</sup> be extended too far into some types of private discrimination." *Sullivan v. Little Hunting Park*, *supra* at 248 (Harlan, J., dissenting).

This Court has consistently recognized the constitutional right of citizens to choose their associates, free from government-directed interference. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *NAACP v. Button*, 371 U.S. 415 (1963). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . ." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Associational rights have been protected "that are not political in the customary sense but pertain to the social, legal and economic benefits of the members." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (*italics supplied*). "A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association." *Evans v. Newton*, 382 U.S. 296, 299 (1966). As Mr. Justice Douglas said last term:

The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

*Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965, 1974-75 (1972) (Douglas J., dissenting).

<sup>15</sup> The same constitutional problems obtain in the application of §§1981, 2000a and similar statutes.

This Court's concern for protection of associational rights parallels the protection historically afforded by the common law. The English equity courts centuries ago refused to issue mandamus to compel admission of unwanted parties.<sup>16</sup> Blackstone in England and Alexis de Tocqueville in America highlighted this concern for associational privacy as a hallmark of the British and American political systems.<sup>17</sup>

<sup>16</sup> The common law considered membership as within the complete control of the association. One refused membership was "entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion." 6 AM. JR. 2d, *Associations* §18, 443-444.

The roots of this principle run deep. In *The King v. the Archbishop of Canterbury and the Bishop of London*, 15 East 117, 104 Eng. Rep. 789 (1812), for example, the King's Bench discharged a rule for mandamus to the Bishop of London. "So it is with the bishop, in respect of the question of fitness: this Court will not interfere with his judgment in that respect. . . ." *Id.* at 126, 792. "There is no instance of such an application for a mandamus to compel a bishop to approve:" *Id.* at 139, 797. The rule was not a novel one in 1812. *Bishop of Exeter v. Hele*, Show. Parl. Cas. 114, 1 Eng. Rep. 61 (H.L. 1693); *Churchwardens of St. Bartholomew's*, 3 Salk. 87, 91 Eng. Rep. 709 (K. B. 1701).

<sup>17</sup> One's right to make this own social choices free from intrusion was recognized by the common law before the Constitution was written. Blackstone's COMMENTARIES recognized a sphere where no government should go:

For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to one another, they have consequently no business or concern with any but social or relative duties. Let a man therefore be ever so abandoned in the principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. 1 W. BLACKSTONE, COMMENTARIES\* 120 (1763).

Alexis de Tocqueville posited a similar understanding of the rights of governments and the rights of men:

The most natural privilege of man next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be almost inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundation of society. 1 DEMOCRACY IN AMERICA 196 (Bradley ed. 1954).

He continued and said: "[I]n no country in the world has the principle of association been more successfully used or more unsparingly

American courts have followed their English counterparts in this area:

No case can \* \* \* be found where the power of any court has been exercised \* \* \* to require the admission of any person to original membership in any such voluntary association. \* \* \* No person has any abstract right to be admitted to such membership  
\* \* \* 18

applied to a multitude of different objects than in America." *Id.* at 197. "[N]othing could be more natural to an American than to join an association in pursuit of interests shared by others. . . ." W. WARNER, *THE EMERGENT AMERICAN SOCIETY* 276 (1967). Indeed, the American character was neatly summarized in the title of a well known article. *Schlesinger, Biography of a Nation of Joiners*, 50 AM. HIST. REV. 1 (1944).

The hallmark of the English and American political systems has been the common regard for the right of the individual to be free from state interference in his daily social and personal affairs.

<sup>18</sup> *Mayer v. Journeymen Stonecutters' Ass'n.*, 47 N.J. Eq. 519, 524, 20 A. 492, 494 (1890). The English doctrine was adopted by American courts, as summarized in *Trautwein v. Harbout*, 40 N.J. Super. 247, 260, 123 A.2d 30, 37 (1956):

The authorities cited by plaintiffs are almost entirely expulsion cases. As we shall see, there are no adjudicated cases which can be regarded as square holdings as to the existence of a right of action for damages for wrongful exclusion from a purely social or fraternal organization, and our consideration of that subject must perforce be based upon principle and analogies of related torts. If . . . the instant case . . . [was] truly one of expulsion from membership, the cases cited by plaintiffs would be pertinent. (Italics supplied.)

See also *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957); *Arnstein v. ASCAP*, 29 F. Supp. 388 (S.D. N.Y. 1939).

The principle that courts will not interfere with the admission procedures of voluntary social and fraternal organizations continues in force. Last term this Court said: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Board of Regents of State Colleges v. Roth*, 92 S. Ct. 2701, 2709 (1972). In Maryland, where Wheaton-Haven is located, "the expressed rule is that usually a private voluntary organization may accept or refuse members as it chooses, subject only to its own constitution, charter and by-laws." *Grempler v. Multiple List. Bureau*, 258 Md. 419, 426, 266 A.2d 1, 4-5 (1970).

Concern for associational privacy has always tempered this Court's approach to civil rights. In the *Civil Rights Cases*, 109 U.S. 3, 24 (1883), this Court stated the constitutional principle in certain terms. "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car . . . ." The first Justice Harlan, in dissent, agreed with the majority on the principle itself:

I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit and maintain social relations with another is a matter with which government has no concern. *Id.*, at 59.

Mr. Justice Goldberg, concurring in *Bell v. Maryland*, 378 U.S. 228, 313 (1964), reiterated the constitutional understanding.

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private associations are themselves constitutionally protected liberties.

The right to choose one's associates can be exercised arbitrarily, capriciously and for the worst motives. It is, however, a right guaranteed citizens of all races, religions, and nationalities by the Constitution and unimpaired by civil rights acts. It is a right that is enjoyed by all citizens, not reserved for the exclusive benefit of the socially elite.

There are two complementary principles to be reconciled in this case. One is the right of the individual



to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs as he chooses. The other is the constitutional ban . . . against state-sponsored racial inequality . . . . A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association. *Evans v. Newton*, 382 U.S. 296, 298-299 (1966).

## II.

JUDGMENT WAS PROPERLY ENTERED IN FAVOR OF A DIRECTOR OF WHEATON-HAVEN WHO WAS OPPOSED TO THE POLICY OF RACIAL DISCRIMINATION ATTRIBUTED TO THE CORPORATION.

In the event that this Court were to conclude that Wheaton-Haven falls within the coverage of the Civil Rights Acts of 1866 or 1964, the judgment should be affirmed nevertheless as to McIntyre on the basis that no acts of racial discrimination have been attributed to him personally. That the courts below found it unnecessary to reach this issue is immaterial. This Court may consider any position in support of the judgment in his favor which find support in the record. *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947); *Langnes v. Green*, 282 U.S. 531, 533-539 (1931).

The present complaint articulates no basis for relief against McIntyre or any other individual defendant. Although petitioners complain of the collective refusal by the corporation and its officers and/or directors to permit them use of the pool, the short answer is that one never incurs personal liability for corporate acts or policies "unless he specifically directed the particular act to be done, or participated or cooperated therein" 3 FLETCHER CYCLOPEDIA CORPORATIONS, §1137 (1965 ed.). "Specific direction

or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation" *Lobato v. Pay Less Drug Stores*, 261 F.2d 406, 409 (10th Cir. 1958). Merely identifying one as an "officer and/or director" of the offending corporation is not enough. *McCoy v. Stroud & Co.*, 373 F.2d 862, 865 (3rd Cir. 1967); *Lahr v. Adell Chemical Co., Inc.*, 300 F.2d 256, 260 (1st Cir. 1962); *Phelps Dodge Refining Corp. v. FTC*, 139 F.2d 393, 397 (2d Cir. 1943). And conclusory allegations in the complaint to this effect are equally insufficient to withstand a properly supported motion for summary judgment. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-290 (1968).

What is true with respect to actions at law for damages is equally applicable in suits for injunctive relief:

\* \* \* [T]he officers, agents and stockholders of a corporation are not necessary parties defendant in either an action at law or a suit in equity against the corporation unless, generally, they have a distinct individual and indivisible interest or a distinct several liability as participants in the wrongdoing or breach of contract complained of; and it is ordinarily improper to join them as such parties defendant merely because of their relation to the corporation. And this rule undoubtedly obtains in the case of a suit for an injunction as well as in the case of any other suit in equity. 10 FLETCHER CYCLOPEDIA CORPORATIONS §4873 (1970 rev.).

And see *SEC v. Union Corp. of America*, 205 F. Supp. 518, 521-522 (E.D. Mo.), *aff'd* 309 F.2d 93 (8th Cir. 1962) (injunction against corporation not extended to officers and directors not shown to have acted in bad faith).

Although the question has never been squarely decided by this Court, there is unanimity of decision in the lower federal courts that corporate conduct which is actionable under civil rights legislation does not, of itself, impose personal liability upon individuals acting solely in a representative capacity. Unless the complaint specifically alleges acts of personal wrongdoing, a claim is not stated against members of a board charged with acting improperly as a corporate body. *Derby v. University of Wisconsin*, 325 F. Supp. 163, 164 (E.D. Wis. 1971); *Lessard v. Van Dale*, 318 F. Supp. 74, 75-76 (E.D. Wis. 1970); *Abel v. Gousha*, 313 F. Supp. 1030, 1031 (E.D. Wis. 1970); *Schwartz v. Galveston Independent School District*, 309 F. Supp. 1034, 1037-1038 (S.D. Texas 1970); *Wesley v. City of Savannah, Georgia*, 294 F. Supp. 698, 703 (S.D. Ga. 1969) (as to three defendants).

Petitioners do not dispute these principles of personal liability. Instead they seek to implicate McIntyre in the exclusionary policies which they attribute to Wheaton-Haven (Pet. Br. 31, n.18). However, it was McIntyre who "championed the cause of the admission of Dr. Press" (Pet. App. B-30). As a director of Wheaton-Haven, he stood opposed to policies of racial exclusion (A. 111, 124-126).

Petitioners assert that McIntyre informed Dr. Press he was probably unacceptable to the membership because of his race (Pet. Br. 31, n.18), but fail to point out that McIntyre, voluntarily "sounded out" other members of the board of directors because Dr. Press asked him to do so (A. 105, 124). Petitioners also complain that McIntyre never made a motion at a board meeting to admit Dr. Press to membership (Pet. Br. 31, n.18). The petitioners do not attempt to clarify why McIntyre was, in the first place, under any duty to do so. But even if such a duty existed,

any motion would have been a futile exercise since it would have been voted down (A. 104, 105, 124).<sup>19</sup>

It should be noted McIntyre was defeated for reelection to Wheaton-Haven board of directors when his term expired late in 1970. While retaining ordinary membership, he no longer occupies any position in the organizational hierarchy and cannot participate in the board's decisions. Under analogous circumstances, an action to compel an official to perform a public duty is held to abate against the incumbent upon his retirement, although it may survive as to his successor. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 386 U.S. 582, 588-589 (1961); *Pullman Co. v. Knott*, 243 U.S. 447 (1917); *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897). Identical considerations apply here.

---

<sup>19</sup> With respect to Wheaton-Haven's policy as to guests, petitioners assert: "... [A]t one board meeting in the summer of 1968, when Wheaton-Haven's guest policy was under discussion, McIntyre admittedly made a motion 'to bar all Negro guests'" (Pet. Br. 31, n. 18).

The so-called motion "to bar all Negro guests" must be considered in proper context. During the meeting in question McIntyre urged the board to formulate a specific guest policy so as to relieve the teenage gate attendants of the decisional burden. He proposed initially a resolution to admit any bona fide guest, *irrespective of race*. Only after that resolution failed did he submit his contrary motion, which failed for want of a second. Disgusted by the board's indecisiveness, McIntyre left the meeting and "went for a swim" (A. 116). The guest policy was adopted by the board and ratified later by the general membership (A. 117). McIntyre voted against that policy (A. 125-126).

**CONCLUSION**

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

JOHN H. MUDD,

H. THOMAS HOWELL,

10 Light Street (17th Floor)  
Baltimore, Maryland 21202,

Attorneys for Respondent,  
E. Richard McIntyre.\*

Of Counsel:

SEMMES, BOWEN & SEMMES.

10 Light Street (17th Floor),  
Baltimore, Maryland 21202.

August, 1972

---

\* We wish to acknowledge the assistance of University of Virginia law student, Joseph A. Schwartz, III.



FILE COPY

SEP 6 1972  
FILED

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

No. 71-1136

MURRAY TILMAN, ET AL., *Petitioners*

v.

WHIMATON-HAVEN RECREATION ASSOCIATION,  
INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of  
Appeals for the Fourth Circuit

REPLY BRIEF FOR MONTGOMERY COUNTY,  
MARYLAND, AS AMICUS CURIAE

RICHARD S. MCKERNON  
*County Attorney for  
Montgomery County, Maryland*

ALFRED H. QANTER  
*Deputy County Attorney*

WILLIAM J. CHEN, JR.  
*Assistant County Attorney*  
*Attorneys for Amicus Curiae,  
Montgomery County, Maryland*

County Office Building  
Rockville, Maryland 20850  
279-1346

## INDEX

	Page
Preliminary Statement .....	1
<b>ARGUMENT:</b>	
I. The Montgomery County Commission on Human Relations is a legally constituted local administrative agency .....	2
II. The Respondents do not operate their pool facility by right, and do not have a commitment to racial indiscrimination .....	8
CONCLUSION .....	12

## CITATIONS

### CASES:

<i>Charlotte Harbor &amp; N. Ry. Co. v. Welles</i> , 260 U.S. 8, 11-12, 43 S.Ct. 3, 4 (1922) .....	5
<i>City of Takoma Park v. County Board of Appeals for Montgomery County</i> , 259 Md. 619, 621, 270 A.2d 772, 773 (1970) .....	8, 9, 10
<i>F.C.C. v. Schreiber</i> , 381 U.S. 279, 85 S.Ct. 1459 (1965) .....	13
<i>Heaps v. Cobb</i> , 185 Md. 372, 45 A.2d 73 (1945) .....	13
<i>Leonardo v. Board of County Com'rs. of St. Mary's County</i> , 214 Md. 287, 301-302, 134 A.2d 284, 290-291 (1957) cert. den. 355 U.S. 906, 78 S.Ct. 332 (1957), reh. den. 355 U.S. 967, 78 S.Ct. 534 (1958) .....	4
<i>Lerch v. Maryland Port Authority</i> , 240 Md. 438, 214 A.2d 761 (1965) .....	13
<i>Martin v. Norris</i> , 188 Md. 330, 52 A.2d 470 (1947) ....	13
<i>Montgomery Citizens League v. Greenhalgh</i> , 253 Md. 151, 252 A.2d 242 (1969) .....	6, 7
<i>Montgomery County v. Elliott</i> , Equity No. 36124 (in the Circuit Court for Montgomery County, Maryland, filed September 12, 1969) .....	3
<i>M.L.R.B. v. E. C. Atkins Co.</i> , 331 U.S. 398, 67 S.Ct. 1265 (1947), reh. den. 331 U.S. 868, 67 S.Ct. 1725 (1947) .....	13

	Page
<i>O'Brian v. Baltimore County Com'rs.</i> , 51 Md. 15, 24 (1879) .....	4
<i>Rockville Fuel and Feed Co. v. Board of Appeals</i> , 257 Md. 183, 262 A.2d 499 (1970) .....	8, 9, 10
<i>Scully v. Montgomery Citizens</i> , 249 Md. 271, 239 A.2d 92 (1968) .....	3, 6
<i>Tauber v. County Board of Appeals for Montgomery County</i> , 257 Md. 202, 212, 262 A.2d 513, 518 (1970) .....	9
<i>Tempel v. U.S.</i> , 248 U.S. 121, 39 S.Ct. 56 (1918) .....	13
<i>Thomson v. Lee County</i> , 70 U.S. 327, 3 Wall. 327, 331 (1865) .....	5
<i>U.S. v. Chemical Foundation</i> , 272 U.S. 1, 47 S.Ct. 1 (1926) .....	13

#### FEDERAL STATUTES:

Civil Rights Act of 1964, 42 U.S.C., Sec. 2000a .....	14
---	----

#### COUNTY CODE AND ORDINANCES:

Chapter 19, Laws of Montgomery County 1968 ....	6
Montgomery County Code 1965, as amended	
Section 77-11 .....	5
Section 111-35 .....	10, 11
Section 111-36 .....	10, 11
Section 111-36f .....	12
Section 111-37n .....	8
Ordinance No. 4-120 (January 16, 1962) .....	2
Bill No. 46-69 (September Legislative Session 1969) ..	3

#### TREATISE:

3 American Law of Zoning, <i>Special Permits</i> , Sec. 15.17 (1968) .....	9
2 Sutherland, <i>Statutory Construction</i> , Secs. 2213, 2214 and 2217 (3rd ed. 1943) .....	4

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

---

No. 71-1136

---

**MURRAY TILLMAN, ET AL.,** *Petitioners*

v.

**WHEATON-HAVEN RECREATION ASSOCIATION,  
INC., ET AL.,** *Respondents*

---

On Writ of Certiorari to the United States Court of  
Appeals for the Fourth Circuit

---

**REPLY BRIEF FOR MONTGOMERY COUNTY,  
MARYLAND, AS AMICUS CURIAE**

---

**PRELIMINARY STATEMENT**

The Respondents, except Richard McIntyre, in their Brief on the Merits have challenged the legality of the Montgomery County Commission on Human Relations, and by virtue of this challenge have sought to impugn the administrative opinion, findings of fact,

conclusion of law, decree and final order<sup>1</sup> out of which this controversy arises. The Respondents in their Brief also seek to convince this Court that they hold the "special exception" under which they operate their swimming pool facility by right, and that, therefore, they do not have nor ever had a commitment not to discriminate on the basis of race. Because of the inaccuracies which are raised by the two aforementioned propositions, this Reply Brief is filed.

### ARGUMENT

#### L

#### **The Montgomery County Commission on Human Relations Is a Legally Constituted Local Administrative Agency**

The Respondents charge that the Montgomery County Commission on Human Relations is illegally constituted and, therefore, the administrative processes of one of its Panels should be ignored. The local agency is not a "rump body" nor are its findings "false". The local legislation which created the Montgomery County Commission on Human Relations was enacted during an "executive session" of the Montgomery County Council on January 16, 1962 (Ordinance No. 4-120) (A. 143). Thereafter, the local agency was established and operated. Periodically, its enabling legislation was amended. Amendments were always enacted into law during "executive session" of the County Council. In 1968, part of the Human Relations laws were challenged. This challenge resulted in a decision by the Maryland Court of Appeals that that part of the County Human Relations laws which dealt with "fair housing" could not be enacted during "executive session" but had to be enacted in "legisla-

---

<sup>1</sup> Reproduced as Appendix A to Brief on the Merits for Montgomery County, Maryland, as *Amicus Curiae*.



tive session" by the County Council. *Scull v. Montgomery Citizens*, 249 Md. 271, 239 A.2d 92 (1968). It was upon the authority of *Scull* that the Circuit Court for Montgomery County, Maryland, found that the "public accommodations" part of the Human Relations Laws were also invalid (A. 144-148). *Montgomery County v. Elliott*, Equity No. 36124 (In the Circuit Court for Montgomery County, Maryland, filed September 12, 1969). The "fair housing" and "public accommodations" laws had been enacted as separate ordinances.

The administrative investigation and proceedings out of which the instant controversy arises occurred in early 1969; the agency's Opinion, Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order were rendered on May 29, 1969. It was during the *Elliott* controversy that the instant controversy was progressing through the administrative process. On October 7, 1969, immediately after the *Elliott* decision, legislation was introduced before the Montgomery County Council in "legislative session" to re-enact the "public accommodations" law. (Bill No. 46-49, County Council for Montgomery County, Maryland (September Legislative Session 1969)). The new "public accommodations" law, with certain improvements, was enacted and became effective on November 4, 1969.

It is clear that the enactment of the Human Relations laws during "executive session" constituted a technical defect which was "cured" by the re-enactment of the laws during "legislative session" on November 4, 1969. This type of legislative mistake is not unusual, as unfortunate as it may be, and the subsequent re-enactment of the laws validated the previous

actions by the local agency. One of the leading treatises on statutory construction recognizes this and comments:

"A curative act is a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting." 2 Sutherland Statutory Construction, Sec. 2213 (3d ed. 1943).

And:

"The corporate existence and the legislative and administrative acts of municipal corporations, including cities and towns, school districts, drainage districts, townships and counties may be validated by properly enacted curative statutes. Because there is apparent legislative cognizance of the fact that most political subdivisions must be administered by personnel unfamiliar with the intricacies of the law, and because courts generally afford liberal interpretation to action taken for the public benefit, there is a mutual legislative and judicial willingness to forgive, forget and legalize. Only in case the curative act attempts to validate that which could not have been originally authorized, or to validate action which impairs the obligation of contracts or interferes with created rights will courts declare the statute unconstitutional." *Id.*, Sec. 2217, *Cf.* Sec. 2214.

The principles underlying curative legislation have been long recognized and embraced by the Maryland courts as well as this Court. *Leonardo v. Board of County Com'rs. of St. Mary's County*, 214 Md. 287, 301-302, 134 A.2d 284, 290-291 (1957), *cert. den.* 355 U.S. 906, 78 S.Ct. 332 (1957), *reh. den.* 355 U.S. 967, 78 S.Ct. 534 (1958); *O'Brian v. Baltimore County*

*Com'rs.*, 51 Md. 15, 24 (1879); *Charlotte Harbor & N.Ry. Co. v. Welles*, 260 U.S. 8, 11-12, 43 S.Ct. 3, 4 (1922); *Thomson v. Lee County*, 70 U.S. 327, 3 Wall. 327, 331 (1865). In *Charlotte Harbor & N.Ry. Co.*, it was said:

"The general and established proposition is that what the Legislature could have authorized, it can ratify if it can authorize at the time of ratification. [citations] And the power is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." 260 U.S. at 11-12, 43 S.Ct. at 4.

It also should be noted that in re-enacting the "public accommodations" law, the County Council provided that enforcement of the "public accommodations" laws shall be in accordance with the enforcement provisions of the "fair housing" laws. The re-enacted "public accommodations" law specified:

"Sec. 77-11. Commission Panel on Public Accommodations; Authority; Enforcement procedures.

(a) The Commission's Panel on Public Accommodations shall be selected and have the functions enumerated in Section 77-13(d), Chapter 19 of the Laws of Montgomery County 1968.

(b) The Commission Panel on Public Accommodations shall have the authority and power enumerated in Section 77-16, Chapter 19 of the Laws of Montgomery County 1968, except that Section 77-16(a) thereof insofar as it applies to Sec. 77-11(b) herein shall be concerned with public accommodations in lieu of housing and real property matters.

(c) The Commission Panel on Public Accommodations shall have the procedures for enforcement as enumerated in Section 77-17, Chapter 19 of the Laws of Montgomery County 1968."

Chapter 19 of the Laws of Montgomery County 1968 was the Council re-enactment of the "fair housing" laws in "legislative session" which was necessitated by the *Scull* decision. Chapter 19 of the Laws of Montgomery County 1968 was enacted on May 30, 1968, and became effective on August 15, 1968. The enforcement provisions of the re-enacted "public accommodations" law is a clear statutory ratification of the actions of the Human Relations Commission.

On November 4, 1969, the County Council for Montgomery County corrected a technical irregularity in the local Human Relations laws. It validated a defective exercise of its existing powers. There was no disturbance of, or interference with, vested rights or contractual obligations. The right, power and authority of the Montgomery County Council to enact the Human Relations laws was attacked, again, after the *Scull* technicalities were rectified. The attack failed in *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 252 A.2d 242 (1969), wherein Chief Judge Hammond explained:

"A fair housing or equal accommodation law currently must prima facie be regarded as a reasonable exercise in good faith of the public power to protect the peace and good order of the community and to promote its welfare and good government. While in *Scull* we went no further than to hold the fair housing law invalid and ineffective because not passed in legislative session, it was implicit in the discussion of the case and its background that we thought the County had the power to pass such a law if it did so according to the legislative processes imposed upon it by the General Assembly." 253 Md. at 162, 252 A.2d at 247-248.

The *Greenhalgh* decision has an excellent evaluative review to the history of *Scull* and how it came to pass

that the County Council had utilized "executive sessions" for enacting the "fair housing" and "public accommodations" laws instead of "legislative sessions." 253 Md. at 155, 252 A.2d at 244.

The actions of the local agency as they affected the Respondents in early 1969 constituted no more than the transpiration of an administrative hearing. The Respondents were given notice of the administrative hearing and were afforded a complete opportunity to present witnesses, cross-examine witnesses, introduce evidence and oppose the introduction of evidence. All federal, state and county rights, constitutional and otherwise, were respected and safeguarded. What is particularly fatal to the Respondents' aspirations to exclusivity and privacy is that the agency had before it the *complete transcript* of the 1958 hearing before the Board of Appeals for Montgomery County wherein the Respondents sought their special exception.<sup>2</sup> This transcript documents the duplicity of the Respondents. The recorded testimony unequivocally demonstrates that the Respondent's unsuccessfully approached the County government for the construction of a community swimming pool, that in lieu of County action the Respondents initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

This *Amicus Curiae* has no doubt that the Respondents consider themselves, at this time, a private club.

<sup>2</sup> See Panel Finding No. 6, App. 4a of Brief on the Merits for Montgomery County, Maryland, as *Amicus Curiae*. The Transcript is 223 pages long.



Unfortunately for them, they made a commitment to the County and its citizens when they requested permission to construct and operate their swimming pool facility. The local zoning ordinance provides that a truly private swimming club can be constructed and operated. Section 111-37n of the Montgomery County Code 1965, as amended. There are such clubs in Montgomery County. The Respondents are not such a club. Their actions were conceived in "openness" and only with the advent of Negro neighbors have they sought to repudiate their commitments to the County and its citizenry.

## II.

### **The Respondents Do Not Operate Their Pool Facility by Right, and Do Have a Commitment to Racial Indiscrimination**

The Respondents claim that "[o]nce the requirements are met, a property owner has a prima facie right to enjoy a special exception." (Brief of Respondents, pp. 13-14). The case of *Rockville Fuel and Feed Co. v. Board of Appeals*, 257 Md. 183, 262 A.2d 499 (1970), is cited in support of this claim. It is upon this claim that the Respondents seek to convince this Court that the "special exception" under which they operate their swimming pool facility is held as a matter of right and that, therefore, they do not now have nor ever had a commitment to Montgomery County and its citizenry of racial indiscrimination. This claim is unfounded in law and fact, and is not supported by the case of *Rockville Fuel and Feed Co. v. Board of Appeals*, *supra*.

In Maryland, a special exception is a use which has been legislatively predetermined to be *conditionally* compatible with the uses permitted as of right in a particular zone. *City of Takoma Park v. County Board*

*of Appeals for Montgomery County*, 259 Md. 619, 621, 270 A.2d 772, 773 (1970) (and cases cited therein). Furthermore, the general rule in Maryland is that in reviewing the action of zoning boards a court will not substitute its judgment for the judgment of the board unless its action is shown to be arbitrary, capricious or illegal. And if the questions involved are fairly debatable and the facts presented are sufficient to support the board's decision it must be upheld. Moreover, conditions upon which a special exception may be granted are set out in the ordinance, and the board is given a wide latitude of discretion in passing upon special exceptions so long as the resulting use is in harmony with the general purpose and intent of the zoning plan and will not adversely affect the use of neighboring properties and the general plan of the neighborhood as provided in the zoning ordinance. *City of Takoma Park v. County Board of Appeals for Montgomery County*, *supra*, 259 Md. at 626, 270 A.2d at 775; *Tauber v. County Board of Appeals for Montgomery County*, 257 Md. 202, 212, 262 A.2d 513, 518 (1970). Clearly the Montgomery County Board of Appeals, in granting and denying special exceptions, exercises a quasi-judicial function. The Board performs a discretionary rather than a ministerial task, and, in accordance with generally recognized rules, the Board and not a court has the authority to determine the facts which warrant the issuance of a special exception. 3 American Law of Zoning, *Special Permits*, Sec. 15.17 (1968).

As noted *supra*, *Rockville Fuel and Feed Co. v. Board of Appeals [of the City of Gaithersburg]*, 257 Md. 183, 262 A.2d 499 (1970), does not support the Respondents' claim. In *Rockville Fuel and Feed Co.*

the Maryland Court of Appeals was dealing with the zoning statute of an incorporated municipality located within Montgomery County, Maryland. The case involved a special exception use which *by the city statute* was "permitted by right." 257 Md. at 262, 262 A.2d at 502. The county statute under which the Respondents operate their pool facility does not "permit by right" the use here in issue. Furthermore, the role of the city zoning board is not the same as that of the county zoning board. 257 Md. at 190-191, 262 A.2d at 503. In *Rockville Fuel and Feed Co.* the Court properly read the city statute as legislatively determining that the requirement of promoting the general welfare was met when the specified requirements of the statutory section there in issue were met. 257 Md. at 190, 262 A.2d at 503. The county law, as enunciated in Sections 111-35 and 111-36 of the Montgomery County Code 1965, as amended, and their predecessors are not comparable to the city statute.

The criteria applicable to *all* special exceptions in Montgomery County, Maryland, but not within most incorporated municipalities, are set forth in Section 111-35 of the Montgomery County Code 1965, as amended. *City of Takoma Park v. County Board of Appeals for Montgomery County, supra*, 259 Md. at 623, 270 A.2d at 773. The section provides:

"A *special exception* may be granted when the Board, or the Director, as the case may be, finds from a preponderance of the evidence of record that:

(1) The proposed use does not affect adversely the General Plan for the physical development of the District, as embodied in this Ordinance and in any Master Plan or portion thereof adopted by the Commission; and

(2) The proposed use at the location selected will not:

(a) *adversely affect the health and safety of residents or workers in the area;*

(b) overburden existing public services, including water, sanitary sewer, public roads, storm drainage, and other public improvements;

(c) *be detrimental to the use or development of adjacent properties or the general neighborhood;* nor change the character of the general neighborhood in which the use is proposed considering service required, at the time of the application, population density, character, and number of similar uses; and

(3) *The standards set forth for each particular use for which a special exception may be granted have been met.*

a. The applicant for a special exception shall have the burden of proof, which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Board or the Director." (emphasis added)

Particular importance must be given to the language of the statute which is emphasized because it is pursuant to provisions almost identical to these that the consideration of neighborhood swimming needs were committed to the care and trust of the Respondents in 1958. Section 111-36 of the County Code further provides, in addition to the requirements of Section 111-35, that the Board of Appeals, when appropriate, is empowered to add to the specific provisions enumerated other requirements that it may deem necessary in order to protect adjacent properties, the general neighbor-

hood, and the residents and workers therein. Section 111-36 also provides, in subsection f., that:

f. In addition to the findings required in Sections 111-35 and 111-37, the following special exceptions may be granted when the Board or Director, as the case may be, *finds from a preponderance of the evidence of record that for the public convenience and service a need exists for the proposed use for service to the population in the general neighborhood considering the present availability of such uses to that neighborhood.*

(6) *Swimming pools, community. . . .*" (Emphasis added)

The law, as it existed when the Respondents were given their special exception, did not provide for automatic issuance, and did provide for consideration of community needs and service. It was within the intent and spirit of the law that the Board granted the Respondents' special exception and it was in acknowledgement of that intent and spirit that the Respondents sought to serve the needs of the community and their neighborhood; a service which the local governmental authorities were unable to provide. In 1958, the Respondents were committed to a policy of open indiscriminate membership. They cannot repudiate that policy now.

### CONCLUSION

The Respondents seek to deride the participation of Montgomery County in these proceedings and impugn the proceedings and findings and order of one of its administrative agencies. Montgomery County is no mere interloper. The controversy which gives rise to these proceedings began in early 1969 before the Montgomery County Commission on Human Relations. It was only after the administrative proceedings that fed-



eral litigation was instituted. The hearing before the County agency dealt with the entire history of the Wheaton-Haven swimming pool, beginning with the Respondents' application for a special exception to construct and operate the pool. The agency afforded all parties an opportunity to be heard and present their cases. There were no "Star Chamber" proceedings. This controversy is only the third controversy which has necessitated that court action be instituted in order to bring a public accommodation into compliance with the local laws. The action and decision of the administrative agency is entitled to a presumption of validity, regularity, and full probative value. *F.C.C. v. Schreiber*, 381 U.S. 279, 85 S.Ct. 1459 (1965); *U.S. v. Chemical Foundation*, 272 U.S. 1, 47 S.Ct. 1 (1926); *Lerch v. Maryland Port Authority*, 240 Md. 438, 214 A.2d 761 (1965); *Heaps v. Cobb*, 185 Md. 372, 45 A.2d 73 (1945). And the agency's "Opinion, Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order" is entitled to appellate judicial notice. *N.L.R.B. v. E. C. Atkins & Co.*, 331 U.S. 398, 67 S.Ct. 1265 (1947), *reh. den.* 331 U.S. 868, 67 S.Ct. 1725 (1947); *Tempel v. U.S.*, 248 U.S. 121, 39 S.Ct. 56 (1918); *Martin v. Norris*, 188 Md. 330, 52 A.2d 470 (1947). The document does accurately relate the operative factual background which is dispositive of the question of exclusivity and privacy. It testifies to the Respondents' aspirations to racial discrimination only after Negroes began to move into their neighborhood. It demonstrates that the recognized elements of exclusivity were never present in the activities of Wheaton-Haven Recreation Association, Inc. until it embraced a policy of racial segregation *post-factum*.

For all the foregoing reasons and the reasons set forth in its Brief on the Merits, *Amicus Curiae*, Mont-

gomery County, Maryland, respectfully submits that Wheaton-Haven Recreation Association, Inc. is not entitled to circumvent the provisions of Title II of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000a) as a private club, and, accordingly, the judgments of the lower courts should be reversed.

Respectfully submitted,

RICHARD S. McKERNON  
*County Attorney for  
Montgomery County, Maryland*

ALFRED H. CARTER  
*Deputy County Attorney*

WILLIAM J. CHEN, JR.  
*Assistant County Attorney*

*Attorneys for Amicus Curiae,  
Montgomery County, Maryland*

County Office Building  
Rockville, Maryland 20850  
279-1346

FILE COPY

No. 71-1136

FILED

OCT 31 1972

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

October Term, 1971

**MURRAY TILLMAN, et al.,**

*Petitioners,*

v.

**WHEATON-HAVEN RECREATION ASSOCIATION, INC., et al.,**

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**REPLY BRIEF FOR THE PETITIONERS**

**ALLISON W. BROWN, JR.**

Suite 437

3000 Connecticut Avenue, N. W.

Washington, D. C. 20008

**RAYMOND W. RUSSELL**

22 West Jefferson Street

Rockville, Maryland 20850

***Of Counsel:***

**MELVIN L. WULF**

**SAMFORD JAY ROSEN**

American Civil Liberties

Union Foundation

22 East 40th Street

New York, N.Y. 10016

**SAMUEL A. CHAITOVITZ**

30 West 60th Street

New York, N. Y. 10023

*Attorneys for Petitioners*



## INDEX

## CITATIONS

Cases:	Page
<i>Betts v. Easley</i> , 161 Kan. 459, 169 P.2d 831 (1946) . . . . .	11
<i>Blende v. Maricopa County Medical Society</i> , 96 Ariz. 240, 393 P.2d 926 (1964) . . . . .	10
<i>Cameron v. Int'l Alliance of Theatrical Stage Employees</i> , 118 N.J.Eq. 11, 176 Atl. 692 (1935) . . . . .	11
<i>Carroll v. Local 269, Int'l Brotherhood of Electrical Workers</i> , 133 N.J.Eq. 144, 31 A.2d 223 (1943) . . . . .	11
<i>Directors Guild of America v. Superior Court</i> , 48 Cal. Rptr. 710, 409 P.2d 934 (1966) . . . . .	11
<i>Falcone v. Middlesex County Medical Society</i> , 34 N.J. 582, 170 A.2d 791 (1961) . . . . .	9
<i>Greisman v. Newcomb Hospital</i> , 40 N.J. 389, 192 A.2d 817 (1963) . . . . .	10
<i>Grempler v. Multiple Listing Bureau of Harford County</i> , 258 Md. 419, 266 A.2d 1 (1970) . . . . .	7, 9, 10
<i>James v. Marinsahp Corporation</i> , 25 Cal.2d 721, 155 P.2d 329 (1944) . . . . .	11
<i>Kurk v. Medical Society of the County of Queens</i> , 46 Misc.2d 790, 260 N.Y.S.2d 520 (1965), rev'd on other grounds, 24 App. Div. 2d 897, 264 N.Y.S. 2d 859 (1965) .	10
<i>Marjorie Webster Junior College</i> <i>v. Middle States Ass'n of Colleges &amp; Secondary Schools</i> , 432 F.2d 650 (C.A.D.C., 1970), cert. denied 400 U.S. 965 . . . . .	9, 10
<i>Meyers v. Lux</i> , 76 S.D. 182, 75 N.W.2d 533 (1956) . . . . .	7, 11



<i>Moose Lodge No. 107 v. Irvia</i> , 407 U.S. 163 (1972) . . . . .	6
<i>Order of Int'l Fraternal Alliance v. State</i> , 77 Md. 547, 26 Atl. 1040 (1893) . . . . .	7
<i>People v. Young Men's Father Mathew Total Abstinence Benevolent Society</i> , 41 Mich. 67, 1 N.W. 931 (1879) . . . . .	7
<i>Pinsker v. Pacific Coast Society of Orthodontists</i> , 81 Cal. Rptr. 623, 460 P.2d 495 (1969) . . . . .	10
<i>Porterfield v. Black Bill &amp; Doney Parks Water Users' Ass'n</i> , 69 Ariz. 110, 210 P.2d 335 (1949) . . . . .	7, 11
<i>Seligman v. Toledo Moving Pictures Operators Union</i> , 88 Ohio App. 137, 98 N.E. 2d 54 (1947) . . . . .	11
<i>Sullivan v. Little Hunting Park</i> , 396 U.S. 229 (1969) . . . . .	1, 8
<i>Thorman v. Int'l Alliance of Theatrical Stage Employees</i> , 49 Cal. 2d 629, 320 P.2d 494 (1958) . . . . .	11
<i>Tillman v. Wheaton-Haven Recreation Ass'n</i> , 1 Race Rel. L. Survey 231 (1970) . . . . .	3
<i>Trautwein v. Harbourt</i> , 40 N.J. Super. 247, 123 A.2d 30 (1956) . . . . .	10
<i>Van Daele v. Vinci</i> , 5 Ill. 2d 389, 282 N.E. 2d 728 (1972) . . . . .	10
<i>Williams v. Int'l Brotherhood of Boilermakers</i> , 27 Cal. 2d 586, 165 P.2d 903 (1946) . . . . .	11
<i>Wilson v. Hacker</i> , 200 Misc. 124, 101 N.Y.S. 2d 461 (1950) . . . . .	11
<i>Wilson v. Newspaper &amp; Mail Deliverers' Union</i> , 123 N.J.Eq. 347, 197 A. 720 (1938) . . . . .	11

(iii)

**Statutes:**

**Page**

Civil Rights Act of 1866 (42 U.S.C. §§1981,1982) . . . . .	1
Civil Rights Act of 1964 (42 U.S.C. §2000a) . . . . .	2

**Miscellaneous:**

19 Am. Jur. 2d, Corporations §963 . . . . .	7
110 Cong. Rec. 13697 (1964) . . . . .	2
Hearings on H.R. 7125, 85th Cong., 2nd Sess., pp. 166-167 . .	4
Note, <i>Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend</i> , 40 Geo. Wash. L.R. 1024 (July 1972) . . . . .	2



IN THE  
**Supreme Court of the United States**

October Term, 1971

---

No. 71-1136

---

MURRAY TILLMAN, *et al.*,

*Petitioners,*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., *et al.*,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

REPLY BRIEF FOR THE PETITIONERS

---

1. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the Court held that a community recreation association could not claim immunity from the Civil Rights Act of 18~~6~~6 on the ground that it was a private club, because it lacked a "plan or purpose of *exclusiveness*"

(emphasis added).<sup>1</sup> The Civil Rights Act of 1964 also incorporates the test of *exclusiveness* as the determinant of whether a facility meets the private club exemption of that statute (42 U.S.C., §2000(e)). Thus, Senator Humphrey, floor manager for the legislation, explained to the Senate that the exemption was intended to protect only "the genuine privacy of private clubs . . . whose membership is genuinely *selective*," (emphasis added) 110 Cong. Rec. 13697 (1964). Respondents herein, in their effort to avoid the precedent of *Sullivan* and to qualify for the private club exemption of the 1964 Act, seek to attribute to Wheaton-Haven a degree of exclusiveness which it does not have, and was never intended to have by anyone associated with its origins.

Contrary to respondents' assertion that Wheaton-Haven does not advertise its facilities or solicit membership, the record shows that in order to meet the requirement imposed by the Montgomery County zoning authority, that it submit evidence of having raised 60 percent of its projected construction costs, the promoters of Wheaton-Haven, during 1958, conducted an extensive membership campaign among families in the neighborhoods near the pool. As part of this campaign, a circular was prepared and distributed advertising the features and attractions of the recreational facility (A. 97, 99 (Admission No. 6)). Door-to-door solicitations were also conducted, the only qualification for charter membership in the association being the ability to

---

<sup>1</sup> An informative discussion of the 1866 Act, published after Petitioners' opening brief herein was filed, is contained in Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 Geo. Wash. L. R. 1024 (July 1972).



then pay a minimum \$20 pledge (Montgomery County br., p. 4a).<sup>2</sup> In addition, an open meeting for interested citizens was conducted by Wheaton-Haven's organizers in the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, a governmental agency (A. 97, 99 (Admission No. 7)). Finally, since Wheaton-Haven has frequent membership openings, it has customarily maintained a continuous solicitation for new members in the form of a large sign conspicuously posted at the pool premises bearing the telephone number of the membership chairman (A. 88, 92-93 (Admission Nos. 15, 16), Wheaton-Haven br., pp. 3, 10, Montgomery County br., p. 6a).

In order to qualify for a special zoning exception, Wheaton-Haven's promoters represented to Montgomery County

---

<sup>2</sup> In the Appendix to its *amicus* brief (pp. 1a-14a), Montgomery county has included the official Opinion of its Commission on Human Relations in *Tillman, et al. v. Wheaton-Haven Recreation Association*, No. P.A. 6, June 3, 1969, 1 Race Rel. L. Survey 231 (1970), an administrative proceeding based on the same incidents of racial discrimination that are at issue in the case at bar. The Commission made numerous findings which directly refute any claim of exclusiveness by Wheaton-Haven. The truth of most of these findings is not in dispute, having been conceded by Wheaton-Haven in the instant proceeding (A. 96-99 (Admission Nos. 1, 2, 5, 6, 7, 8, 9, 10, 13, 14)). There is no merit, therefore, to Wheaton-Haven's present attempt (br., pp. 16-17) to discredit those findings. Although 3 months after the Montgomery County Commission entered its order against Wheaton-Haven, the public accommodations ordinance was held in another proceeding to be technically defective under state law because of its enactment in executive rather than legislative session (A. 143-160), the defect was cured by proper re-enactment of the identical ordinance on November 4, 1969 (Montgomery County br., pp. 18a-26a). The Commission's *Wheaton-Haven* opinion was part of the record before the Court of Appeals in the instant proceeding (Pet. App. B22-B23).

officials that the swimming pool would be open to everyone in the community, and would not be an exclusive social facility for the benefit of a few. Thus, in August 1958, in hearings before the County zoning authority on Wheaton-Haven's application for a special exception, its witnesses testified that the County had been unsuccessfully approached about building a municipal pool in the area (Montgomery County br., p. 4a). In lieu of a County facility, Wheaton-Haven's witnesses stated that the organization was attempting to serve the imperative recreational needs of the community, and that the pool was needed for youths as a deterrent to juvenile delinquency (*ibid.*). The zoning board was assured that the proposed pool would not be used for private social functions, but would be for the public benefit of the community at large (*ibid.*). Under the special zoning exception, authorization was given Wheaton-Haven "to permit the construction and use of a community swimming pool" (A. 85, 96 (Admission No. 1), Montgomery County br., p. 15a). This exception came within the new zoning category of "community swimming pool" which had been established by action of the Montgomery County Council on May 24, 1955 (A. 62).<sup>3</sup>

About the same time that Wheaton-Haven obtained zoning approval as a community swimming pool, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified at a hearing before the U.S. Senate Finance Committee concerning excise tax legislation affecting community pools.<sup>4</sup> He stated that community pools

---

<sup>3</sup> See Petitioner's opening br., p. 6, n. 5.

<sup>4</sup> Hearings, July 15, 16 and 17, 1958, on H.R. 7125, Excise Tax Technical Changes Act, 85th Cong., 2nd Sess., pp. 166-167.

serve a significant recreational need in Montgomery County due to the failure of government to construct publicly-owned facilities. He asserted that such pools provide a healthy and constructive outlet for youth and are of general benefit to the public at large. . Finally, Mr. Rotkin said that community pools provide lower middle-income families with recreational opportunities that otherwise would not be available to them, and that such facilities are to be distinguished from private country clubs and their attendant social programs (Montgomery County br., p. 5a).

To concede to Wheaton-Haven — and inferentially similar community pools — the exclusiveness which it now claims, would be contrary to the purposes and expectations of its organizers, the community which it serves, and the Montgomery County government. The record shows clearly that the pool was organized and built on the basis of commitments that it would serve the community-at-large, and there is no justification for allowing those commitments to be dishonored at this time.

The manner of Wheaton-Haven's operation during the 11 years of its existence further confirms its non-exclusive character. The by-laws specify that membership is open to all residents of the three-quarter mile area surrounding the pool. Aside from this geographic qualification, there is no other requirement for membership, and the evidence reveals the rejection of only one applicant in the association's history.<sup>5</sup> The interviewing of applicants, which respondents rely on as evidence of the association's exclusive nature, was only instituted in 1964, and no social, formal

---

<sup>5</sup> For all that appears, this person was rejected because of residence or race; there is no proof of either in the record. Little Hunting Park likewise had rejected one applicant in its history (A. 79).

or business background is obtained from these interviews, their sole purpose apparently being to observe the physical appearance of the applicant (Montgomery County br., pp. 5a-6a).

2. Respondents attempt to draw support for their position from *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), but there is no similarity between the Moose Lodge and Wheaton-Haven. As this Court pointed out, Moose Lodge was a local chapter of a "national fraternal organization having well-defined requirements for membership." 407 U.S. at 171. Fraternal organizations are by their nature exclusive, and hence the Moose constitution specifies that membership is restricted to "male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone of any other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being." 407 U.S. at 181. Obviously, any person who does not meet any one of these qualifications is not eligible for membership in the Moose. Wheaton-Haven, by contrast, has no comparable indicia of exclusiveness, the only requirement for membership being geographic — that a person reside within the three-quarter mile radius of the pool.

Not only is this geographic requirement the sole qualification for membership stated in Wheaton-Haven's by-laws, but its articles of incorporation negate the existence of any general right to determine membership eligibility by applying a racial standard, or to make such determinations on the basis of the personal likes and dislikes of existing members. Thus, the articles of incorporation (Article VIII)<sup>6</sup>

---

<sup>6</sup> The articles of incorporation are part of the record.

specifically state: "Conditions and qualifications of membership shall be fully set forth in the By-Laws." The by-laws make no mention of race as a qualification for membership; hence, reliance on this factor is in direct contravention of the corporate charter. Reliance on race as a qualification also violates the broader principle, recognized by respondents as the rule in *Maryland (McIntyre br., p. 23, n. 18)*, that a voluntary organization's discretion in accepting or rejecting members is circumscribed by "its own constitution, charter, and by-laws." *Grempler v. Multiple Listing Bureau of Harford County*, 258 Md. 419, 266 A.2d 1, 4-5 (1970).

Furthermore, whatever discretion is possessed by Wheaton-Haven's directors and members in accepting or rejecting applicants is limited by the essential purpose for which the organization was formed. As we have seen, Wheaton-Haven's promoters, the public-at-large, and the Montgomery County government conceived this purpose to be the operation of a community swimming pool. For Wheaton-Haven now to bar from its facilities an entire class of residents of the community is a subversion of the corporate purpose, and to this extent is *ultra vires*. 19 Am. Jur. 2d, *Corporations* §963; and see, *Order of International Fraternal Alliance v. State*, 77 Md. 547, 26 Atl. 1040 (1893). It is mandatory that the discretion to approve or disapprove membership applicants be exercised in a manner consistent with the corporation's purpose, and that any applicant be admitted to membership who "possesses the qualifications prescribed by the constitution and by-laws of the association." *Porterfield v. Black Bill & Doney Parks Water Users' Ass'n*, 69 Ariz. 110, 210 P.2d 335, 338-339 (1949); *Meyers v. Lux*, 76 S. D. 182, 75 N.W. 2d 533, 536 (1956); *People v. Young Men's Father Mathew Total Abstinence Benevolent Society*, 41 Mich. 67, 1 N. W. 931, 933, 935 (1879).



3. Respondent McIntyre argues (br., p. 5) that Wheaton-Haven is beyond the ambit of the civil rights statutes because "it is member-controlled, member-financed and member-governed in every respect." This characterization, however, and the factors cited to support it were equally true of Little Hunting Park, the association at issue in the *Sullivan* case. The Court in that case held that such considerations do not determine the issue of statutory coverage. Rather, the question is whether the organization has a "plan or purpose of exclusiveness." *Sullivan*, 396 U.S. at 236. As we have seen, Wheaton-Haven has no such plan or purpose.

Finally, respondent McIntyre emphasizes the historic right of individuals in our system to choose their own associates, and asserts that to require Wheaton-Haven to comply with civil rights laws prohibiting racial discrimination would violate the "associational privacy" of Wheaton-Haven's members (br., pp. 20-25). The fallacy of this argument is that Wheaton-Haven was not founded upon an expectation of associational privacy, but rather upon the commitment that it would provide a community service available to residents of the surrounding geographic area. Consequently, membership was deliberately made open to everyone residing in that area.

Respondent's effort, therefore, to draw support from the historic principle of associational privacy does not aid Wheaton-Haven's position here. But even if one were to concede Wheaton-Haven the element of "privacy" which it claims, that does not automatically give it the right to determine membership eligibility on the basis of race, for even private associations are not as free from judicial supervision of their membership policies as respondent McIntyre would have it appear. Thus, courts with increasing

frequency in recent years have recognized that exclusion from a membership association may well mean far more to a person than hurt feelings. Rather, exclusion can have a definite adverse effect on one's property interests or economic well being. A good example is provided by the instant case where, as we have seen, access to the community swimming pool adds to the value of homes in the neighborhood which it serves, and the homeowner who is a Wheaton-Haven member obtains a specific asset — a first option which he can convey to the purchaser of his home, notwithstanding the existence of a membership waiting list. Wheaton-Haven, thus, through its membership policies, is in a position to significantly affect the property and economic interests of residents of the area where its recreation facilities are located, not to speak of the racial make-up of the neighborhood. Accordingly, Wheaton-Haven, at least, falls within that category of associations which, even though private, are not immune from judicial interference to remedy injury resulting from arbitrary or discriminatory exclusion. As the Maryland Court of Appeals has stated, "With the growth of private associations from rather informal beginnings to positions of real economic power, judicial erosion of the principle of non-interference began." *Grempler v. Multiple Listing Bureau of Harford County*, *supra*, 258 Md. 419, 266 A.2d at 5; and see, *Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools*, 432 F.2d 650, 655-656 (C.A.D.C., 1970), cert. denied, 400 U.S. 965.

In the leading case of *Falcone v. Middlesex County Medical Society*, 34 N. J. 582, 170 A.2d 791 (1961), it was held that organizations, "'membership in which is an economic necessity' or 'those which are repositories of civic, civil or political rights,'" may not claim the right to arbitrarily exclude persons from membership as that enjoyed by purely

social or fraternal organizations.<sup>7</sup> The Court, in the *Falcone* case, held that a county medical society had unjustifiably denied membership to a qualified physician, and ordered that he be admitted. As justification for granting relief, the court emphasized, in terms equally applicable here, that the society,

is not a private voluntary membership association with which the public has little or no concern. It is an association with which the public is highly concerned and which engages in activities vitally affecting the health and welfare of the people.<sup>8</sup>

Similarly, a union which is able to significantly affect employment opportunities and working conditions for workers in an industry may not resort to arbitrary or unreasonable membership practices, for "such a union occupies a quasi public position similar to that of a public service business. . . . It may no longer claim the same freedom

---

<sup>7</sup> The Court distinguished *Trautwein v. Harbourt*, 40 N. J. Super. 247, 123 A.2d 30 (1956), relied on by respondent McIntyre (br., p. 23), which involved the membership policies of the Order of Eastern Star, a fraternal organization.

<sup>8</sup> Accord: *Blende v. Maricopa County Medical Society*, 96 Ariz. 240, 393 P.2d 926 (1964); *Pinsker v. Pacific Coast Society of Orthodontists*, 81 Cal. Rptr. 623, 460 P.2d 495 (1969); *Greisman v. Newcomb Hospital*, 40 N. J. 389, 192 A.2d 817 (1963); *Grempler v. Multiple Listing Bureau of Harford County*, *supra*, 258 Md. 419, 266 A.2d 1, 4-5; *Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools*, *supra*, 432 F.2d 650, 655-656; *Van Duele v. Vinci*, 5 Ill. 2d 389, 282 N.E. 2d 728 (1972); *Kurk v. Medical Society of the County of Queens*, 46 Misc. 2d 790, 260 N.Y.S. 2d 520 (1965), reversed on other grounds, 24 App. Div. 2d 897, 264 N.Y.S. 2d 859 (1965).

from restraint enjoyed by golf clubs or fraternal associations." *James v. Marinship Corporation*, 25 Cal. 2d 721, 155 P.2d 329, 335 (1944).<sup>9</sup> Likewise, in recognition of the important public function performed by utility cooperatives, courts have restrained them from exercising arbitrary powers over whom they will serve or admit to membership, notwithstanding their private ownership. See, e.g., *Porterfield v. Black Bill & Doney Parks Water Users' Ass'n*, *supra*, 69 Ariz. 110, 210 P.2d 335; *Meyers v. Lux*, *supra*, 76 S. D. 182, 75 N.W. 2d 533. It is thus apparent that under modern common law principles an association which would traditionally be regarded as private may nevertheless

---

<sup>9</sup> Accord: *Wilson v. Newspaper & Mail Deliverers' Union*, 123 N. J. Eq. 347, 350-351, 197 A. 720, 722 (1938); *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 586, 165 P.2d 903 (1946); *Seligman v. Toledo Moving Pictures Operators Union*, 88 Ohio App. 137, 98 N.E. 2d 54 (1947); *Carroll v. Local 269, International Brotherhood of Electrical Workers*, 133 N. J. Eq. 144, 31 A.2d 223 (1943); *Cameron v. International Alliance of Theatrical Stage Employees*, 118 N. J. Eq. 11, 176 Atl. 692 (1935). Judicial intervention to assure fair and equitable membership practices does not depend on the union's having a closed shop agreement which enables it to exercise a monopoly over job opportunities. Rather, intervention stems from the fact that a union functions as "the medium for the exercise of industrial franchise. . . . The union, as a kind of public service institution, affords to its members the opportunity to record themselves upon all matters affecting their relationships with the employer." *Directors Guild of America v. Superior Court*, 48 Cal. Rptr. 710, 409 P.2d 934, 941 (1966); and see, *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958); *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831, 839 (1946); *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S. 2d 461 (1950).

possess sufficient quasi-public characteristics to warrant judicial supervision of its membership policies.

### CONCLUSION

As shown herein and in petitioners' opening brief, no meritorious defense exists for ~~defendants'~~ acts of racial discrimination.<sup>10</sup> Accordingly, for the reasons stated by

---

<sup>10</sup> The fact that respondent McIntyre's term as a director of Wheaton-Haven expired late in 1970 (while this case was under submission to the court of appeals) does not affect his possible liability for damages based on his participation in the discrimination against petitioners while he was a director in 1968. There is no support whatever in the record for the suggestion in his brief that he was voted out of office because he took an unpopular stand concerning the association's racial policy. On the contrary, despite his claim that he opposed that policy, and assertedly voted against it at membership meetings, the official minutes of the July 20, 1968 board of directors meeting at which the racially inspired guest policy was adopted show that he was present and voted for it (A. 41-42). Moreover, McIntyre continued to serve as a director for 2-1/2 more years after that policy was adopted, and from December 1969 to December 1970, he served as vice president of the association, in which capacity he participated in the administration and enforcement of the discriminatory policy which he had helped formulate (A. 102).



petitioners, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to remand to the district court for further appropriate proceedings.

Respectfully submitted,

ALLISON W. BROWN, JR.  
Suite 437  
3000 Connecticut Avenue, N. W.  
Washington, D. C. 20008

RAYMOND W. RUSSELL  
22 West Jefferson Street  
Rockville, Maryland 20850

*Of Counsel:*

MELVIN L. WULF  
SANFORD JAY ROSEN  
American Civil Liberties  
Union Foundation  
22 East 40th Street  
New York, N.Y. 10016

SAMUEL A. CHAITOVITZ  
30 West 60th Street  
New York, N. Y. 10023

*Attorneys for Petitioners*

October 1972

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 327.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

TILLMAN ET AL. V. WHEATON-HAVEN

RECREATION ASSN., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

No. 71-1136. Argued November 15, 1972—

Decided February 27, 1973

Respondent association (Wheaton-Haven) operates a community swimming pool, use of which is limited to white members and their white guests. Under Wheaton-Haven's bylaws, a person residing within a geographic preference area, unlike one living outside that area, needs no endorsement for membership from a current member; receives priority (if the membership is full) over all but those who have first options; and (if an owner-member selling his house) can convey a first option for membership on his vendee. Petitioners—the Presses, a Negro couple who bought a home in the preference area from a nonmember, and were denied membership for racial reasons; a white couple, members of Wheaton-Haven, whose Negro guest was refused admission to the pool for racial reasons; and the guest—brought suit for declaratory and injunctive relief under the Civil Rights Acts of 1866, 1870, and 1964, 42 U. S. C. §§ 1982, 1981, and 2000a *et seq.* The District Court granted respondents' motion for summary judgment. The Court of Appeals affirmed, holding that, because Wheaton-Haven membership rights could not be leased or transferred, the case was distinguishable from *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229, making § 1982 unavailable to the Presses, and agreeing with the District Court that Wheaton-Haven was a private club within the meaning of 42 U. S. C. § 2000a (e), and therefore implied an exception to § 1982. *Held*:

1. Respondents' racially discriminatory membership policy violates 42 U. S. C. § 1982. The preferences for membership in Wheaton-Haven gave valuable property rights to white residents in the preference area that were not available to the Presses, and this case is therefore not significantly distinguishable from *Sullivan*, *supra*. Pp. 3-6.



NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20540, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 71-1136

Murray Tillman et al.,

Petitioners,

Wheaton-Haven Recreation

Association, Inc., et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Fourth  
Circuit.

[February 27, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Wheaton-Haven Recreation Association, Inc., a non-profit Maryland corporation, was organized in 1958 for the purpose of operating a swimming pool. After a membership drive to raise funds, the Association obtained zoning as a "community pool" and constructed its facility near Silver Spring, Maryland. The Association is essentially a single-function recreational club, furnishing only swimming and related amenities.<sup>1</sup>

Membership is by family units, rather than individuals, and is limited to 325 families.<sup>2</sup> This limit has been reached on at least one occasion. Membership is largely keyed to the geographical area within a three-quarter mile radius of the pool.<sup>3</sup> A resident (whether or not a

<sup>1</sup> Candy, ice cream, and soft drinks have been sold on the premises, but these were merely incidentals for the convenience of swimmers during the season. Aside from meetings of the board of directors and of the general membership, the premises apparently have been utilized only for pool-related activities.

<sup>2</sup> Wheaton-Haven presently charges an initiation fee of \$375 and annual dues ranging from \$50 to \$60, depending on the number of persons in the family unit.

<sup>3</sup> The Association's bylaws provide that "[m]embership shall be open to bona fide residents (whether or not home owners) of the

## 2 TILLMAN v. WHEATON-HAVEN RECREATION ASSN.

homeowner) of that area requires no recommendation before he may apply for membership; the resident receives a preferential place on the waiting list if he applies when the membership is full; and the resident-member, who is a homeowner and who sells his home and turns in his membership, confers on the purchaser of his property a first option on the vacancy created by his removal and resignation. A person residing outside the three-quarter mile area may apply for membership only upon the recommendation of a member; he receives no preferential place on the waiting list if the membership is full; and he has no way of conferring an option upon the purchaser of his property. Beyond-the-area members may not exceed 30% of the total. Majority approval of those present at a meeting of the board of directors or of the general membership is required before an applicant is admitted as a member.

Only members and their guests are admitted to the pool. No one else may gain admission merely by payment of an entrance fee.

In the spring of 1968 petitioner, Harry C. Press, a Negro who had purchased from a nonmember a home within the geographical preference area, inquired about membership in Wheaton-Haven. At that time the Association had no Negro member. In November 1968 the general membership rejected a resolution that would have opened the way for Negro members. Dr. Press was never given an application form, and respondents concede that he was discouraged from applying because of his race.

In July 1968 petitioners Murray and Rosalind N. Tillman, who were husband and wife and members in good standing, brought petitioner Grace Rosner, a Negro, area within a three-quarter mile radius of the pool," and "may be extended" to others "who shall have been recommended . . . by a member."

The Association's bylaws provide that "[n]o person shall be admitted to membership unless he is recommended by a member and approved by a majority of the board of directors."



to the pool as their guest. Although Mrs. Rosner was admitted on that occasion, the guest policy was changed by the board of directors, at a special meeting the following day, to limit guests to relatives of members. Respondents concede that one reason for the adoption of this policy was to prevent members from having Negroes as guests at the pool. Under this new policy Mrs. Rosner thereafter was refused admission when the Tillmans sought to have her as their guest. In the fall of 1968 the membership, by resolution, reaffirmed the policy.

In October 1969 petitioners (Mr. and Mrs. Tillman, Dr. and Mrs. Press, and Mrs. Rosner) instituted this civil action against the Association and individuals who were its officers or directors, seeking damages and declaratory and injunctive relief, particularly under the Civil Rights Act of 1866, 42 U. S. C. § 1982<sup>\*</sup> (1970), the Civil Rights Act of 1870, 42 U. S. C. § 1981 (1970), and the Civil Rights Act of 1964, 42 U. S. C. § 2000a, *et seq.* (1970). The District Court, in an unreported opinion, held that Wheaton-Haven was a private club and exempt from the nondiscrimination provisions of the statutes. It granted summary judgment for defendants. The Court of Appeals affirmed, one judge dissenting. 451 F. 2d 1211 (CA4 1971). It later denied rehearing *en banc* over two dissents, *id.*, at 1225. We granted certiorari, 406 U. S. 916 (1972), to review the case in the light of *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229 (1969).

# I

In *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968), this Court, after a detailed review of the legislative history of 42 U. S. C. § 1982, *id.*, at 422-437, held that the

<sup>\*</sup> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U. S. C. § 1982.

statute reaches beyond state action and is not confined to officially sanctioned segregation. The Court subsequently applied § 1982 in *Sullivan* to private racial discrimination practiced by a nonstock corporation organized to operate a community park and playground facilities, including a swimming pool, for residents of a designated area. Petitioners Press contend that their § 1982 claim is controlled by *Sullivan*. We agree.

A. The Court of Appeals held that § 1982 would not apply to the Presses because membership rights in Wheaton-Haven could neither be leased nor transferred incident to the acquisition of property. 451 F.2d, at 1218-1217. In *Sullivan*, the Court concluded that the right to enjoy a membership share in the corporation, assigned by a property owner as part of a leasehold he was granting, constituted a right "to lease . . . property" protected by § 1982. 396 U.S. at 236-237. The Court of Appeals distinguished property-linked membership shares in *Sullivan* from property-linked membership preferences in Wheaton-Haven by emphasizing the speculative nature of the benefits available to residents of the area around Wheaton-Haven. We conclude that the Court of Appeals erroneously characterized the property-linked preferences conferred by Wheaton-Haven's bylaws.

Under the bylaws a resident of the area within three-quarters of a mile from the pool receives the three preferences noted above: he is allowed to apply for membership without seeking a recommendation from a current member; he receives preference over others, except those with first options, when applying for a membership vacancy; and, if he is an owner-member, he is able to pass to his successor-in-title a first option to acquire the membership Wheaton-Haven purchases from him.\* If

\* Under the Wheaton-Haven system, a within-the-area member selling his home may either retain his membership or seek to sell it

the membership is full, the preference area resident is placed on the waiting list; other applicants, however, are required to reapply after those on the waiting list obtain memberships.

The Court of Appeals concluded, incorrectly it later appeared, that the membership had never been full,\* and that the option possibility, therefore, was "far too tenuous a threat to support a conclusion that there is a transfer of membership incident to the purchase of property." 451 F. 2d, at 1217. Since the Presses had not purchased their area home from a member, the court found no transaction by which the Presses could have acquired a membership preference. 451 F. 2d, at 1217-1218, n. 14.

We differ from the Court of Appeals in our evaluation of the three rights obtained. The record indicates that the membership was full in the spring of 1968 but dropped, perhaps not unexpectedly in view of the season, in the fall of that year. We cannot be certain, either, that the membership would not have remained full in the absence of racial discrimination,<sup>7</sup> or that the membership will never be full in the future. As was observed in dissent in the Court of Appeals:

"Several years from now it may well be that a white neighbor can sell his home at a considerably

back to the Association. If Wheaton-Haven is willing to purchase, it pays 80% of the initial cost if the membership is not full, and 90% if the membership is full. The purchaser of the member's home then has a first option on the membership so released by the seller. The practical effect of this system is to prefer applicants who purchase from members over other applicants, particularly at a time when the membership is full.

\* In the court's *per curiam* statement responsive to the petition for rehearing, it described its earlier observation that the membership list had never been full as an "inadvertent misstatement . . . now corrected to reflect a full membership list in the spring of 1968." 451 F. 2d, at 1225.

<sup>7</sup> The record reveals that a number of members withdrew when the present suit was filed. Tr. of Arg. in District Court 15.

higher price than Dr. and Mrs. Press because the white owner will be able to assure his purchaser of an option for membership in Wheaton-Haven. Dr. and Mrs. Press, however, are denied this advantage." 451 F. 2d, at 1223.

Similarly, the automatic waiting-list preference given to residents of the favored area may have affected the price paid by the Presses when they bought their home. Thus the purchase price to them, like the rental paid by Freeman in *Sullivan*, may well reflect benefits dependent on residency in the preference area. For them, however, the right to acquire a home in the area is abridged and diluted.

When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U. S. C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident.

B. Respondents contend that even if 42 U. S. C. § 1982 applies, Wheaton-Haven nevertheless is exempt as a private club under § 201 (e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (e),<sup>\*</sup> with a consequent implied narrowing effect upon the range and application of the older § 1982. In *Sullivan* we found it unnecessary to consider limits on § 1982 as applied to a truly private association because we found "no plan or purpose of exclusiveness" in Little Hunting Park. 396 U. S., at 236. But here, as there, membership "is open to every

<sup>\*</sup> "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section." 42 U. S. C. § 2000a (e).

white person within the geographic area, there being no selective element other than race." *Id.*, at 236. The only restrictions are the stated maximum number of memberships and, as in *Sullivan*, 396 U. S., at 234, the requirement of formal board or membership approval. The structure and practices of Wheaton-Haven thus are indistinguishable from those of Little Hunting Park.<sup>9</sup> We hold, as a consequence, that Wheaton-Haven is not a private club and that it is not necessary in this case to consider the issue of any implied limitation on the sweep of § 1982 when its application to a truly private club, within the meaning of § 2000a (e), is under consideration. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163 (1972); *Daniel v. Paul*, 395 U. S. 298 (1969).

## II

Mrs. Rosner and the Tillmans, relying on 42 U. S. C. §§ 1981,<sup>10</sup> 1982, and 2000a *et seq.*, contend that Wheaton-

<sup>9</sup> Apparently one applicant was formally rejected during the preceding 12 years of Little Hunting Park's operation. Appendix 127 and Brief for Petitioner 7, *Sullivan v. Little Hunting Park*, 396 U. S. 229 (1969). At Wheaton-Haven one applicant was formally rejected in the preceding 11 years.

The Court of Appeals found it "inferable from Little Hunting Park's organization and membership provisions that it was built by the same real estate developers who built the four subdivisions from which members were drawn, as an aid to the sale of homes." 461 F. 2d, at 1215 n. 8. This inference may be erroneous. Appendix 24-36 and Tr. of Oral Arg. 24, 31-34, *Sullivan v. Little Hunting Park*, 396 U. S. 229 (1969). In any event, *Sullivan* did not rest on any relationship between the club and real estate developers.

<sup>10</sup> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U. S. C. § 1981.



Haven could not adopt a racially discriminatory policy toward guests. The District Court granted summary judgment for the respondents on these claims also, holding that Wheaton-Haven was a private club and exempt from all three statutes.

The operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c. 31, § 1, 14 Stat. 27. *Hurd v. Hodge*, 334 U. S. 24, 30-31 n. 7 (1948).<sup>12</sup> In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club. Consequently,

<sup>12</sup> The Act of April 9, 1866, read in part:

"That all persons born in the United States . . . of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of personal and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." 14 Stat. 27.

The present codification of § 1981 is derived from Revised Statutes § 1977 (1878), which codified the Act of May 31, 1870, c. 114, § 16, 16 Stat. 144. Although the 1866 Act rested only on the Thirteenth Amendment, *United States v. Harris*, 106 U. S. 629, 640 (1882); *Civil Rights Cases*, 109 U. S. 3, 22 (1883); *United States v. Morris*, 125 F. 322, 323 (E.D. Ark. 1903), and, indeed, was enacted before the Fourteenth Amendment was formally proposed, *United States v. Price*, 383 U. S. 787, 804 (1966); *Hurd v. Hodge*, 334 U. S. 24, 32 n. 11 (1948); *Oyama v. California*, 332 U. S. 633, 640 (1948); *Civil Rights Cases*, *supra*, 109 U. S., at 22, the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment. See *United States v. Wong Kim Ark*, 169 U. S. 649, 695-696 (1908). The 1866 Act was re-enacted in 1870, and the predecessor of the present § 1981 was to be "enforced according to the provisions" of the 1866 Act. Act of May 31, 1870, c. 114, § 18, 16 Stat. 144.

our discussion and rejection of Wheaton-Haven's claim that it is exempt from § 1982 disposes of the argument that Wheaton-Haven is exempt from § 1981. On remand the District Court will develop any necessary facts concerning the adoption of the guest policy and will evaluate the claims of the parties<sup>12</sup> free of the misconception that Wheaton-Haven is exempt from §§ 1981, 1982, and 2000a.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

---

<sup>12</sup> Respondent McIntyre urges that the judgment in his favor should be affirmed as to him because he was merely a director of Wheaton-Haven and was later defeated in his bid for re-election to its board, and because, in his deposition, he stated that he opposed the Association's exclusionary practices. Neither the District Court nor the Court of Appeals discussed Mr. McIntyre's individual liability, and we find it inappropriate to attempt resolution of this issue on the present record.